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TABLE OF CONTENTS

Judges of the Court of Appeals	v
Superior Court Judges	vi
District Court Judges	viii
Attorney General	xii
Superior Court Solicitors	xiii
Table of Cases Reported	xiv
Table of General Statutes Construed	xxi
Rules of Civil Procedure Construed	xxiii
Constitution of United States Construed	xxiii
Rules of Practice Construed	xxiv
Disposition of Petitions for Certiorari to Court of Appeals ..	xxv
Disposition of Appeals to Supreme Court	xxix
Opinions of the Court of Appeals	1-749
Analytical Index	753
Word and Phrase Index	793

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CASES REPORTED

PAGE	PAGE
Aero Mayflower Transit Co., Leary v.....	Bullard, In re..... 245
Aikens, S. v..... 310	Burgess, S. v..... 79
Alexander, S. v..... 196	Burkhead v. White..... 432
Allen Co., Freight Carriers v..... 442	Burnette, S. v..... 29
Almon, Falkner v..... 643	Burton, S. v..... 559
A & P Tea Co., Tolbert v..... 491	Butts, S. v..... 504
Armstrong, S. v..... 36	Byrd, S. v..... 320
Askew, S. v..... 584	Cabarrus Memorial Hospital, Inc., Sides v..... 117
Attorney General v. Power Co..... 300	Camp, S. v..... 109
Attorney General v. Power Co..... 497	Campbell v. Campbell..... 696
Averette, S. v..... 181	Cannady, S. v..... 53
	Canty, S. v..... 45
Ballance v. Wentz..... 363	Cape Fear Electric Co. v. Newspapers, Inc..... 519
Ballou, Rock v..... 51	Carder v. Henson..... 318
Barber, S. v..... 615	Carr, S. v..... 573
Barringer & Gaither, Inc. v. Whittenton..... 316	Carver v. Mills..... 745
Baumann, Lachmann v..... 160	Carver, S. v..... 674
Beard, S. v..... 596	Catawba County Dept. of Social Services, Browne v..... 476
Beatty, In re..... 563	Chavis v. Reynolds..... 734
Beck v. Beck..... 655	Choate, Sparks v..... 62
Bell, S. v..... 348	Church, Fishel and Taylor v..... 647
Benfield, S. v..... 330	City of High Point, Power Co. v. 91
Bennett, S. v..... 671	City of Kinston, Quadrant Corp. v..... 31
Billings, S. v..... 73	City of Raleigh, Taylor v..... 259
Birchfield, S. v..... 38	City of Winston-Salem Board of Adjustment, Long v..... 191
Blackwelder, S. v..... 18	City of Winson-Salem, Harrell v..... 386
Blakely, S. v..... 337	Clark, S. v..... 81
Board of Adjustment, Long v. 191	Clark v. Williams..... 341
Board of Education, Eggimann v..... 459	Clemons v. Morris..... 76
Board of Transportation v. Harrison..... 193	Cloer, S. v..... 57
Booth, Neal v..... 415	Cogdell, S. v..... 327
Boucher, Brooks v..... 676	Collins, S. v..... 590
Boyce v. McMahan..... 254	Commissioner of Revenue, Food Stores v..... 272
Boykins, S. v..... 34	Commodities International, Inc. v. Eure, Sec. of State..... 723
Brake, S. v..... 342	Contractors, Inc., Strickland v. 729
Brantley v. Meekins..... 683	Cook, S. v..... 353
Brinkley, S. v..... 339	Copeland, S. v..... 504
Broadcasting Corp., Peace v..... 631	County of Catawba Dept. of Social Services, Browne v..... 476
Brooks v. Boucher..... 676	County of Forsyth Dept. of Social Services v. Roberts..... 658
Brooks v. Brooks..... 507	County of Mecklenburg Board of Comrs., In re..... 225
Broughton v. Broughton..... 233	
Brown v. Gurkin..... 456	
Brown v. Moore..... 445	
Brown, S. v..... 38	
Browne v. Dept. of Social Services..... 476	
Buchanan, S. v..... 167	

CASES REPORTED

PAGE	PAGE
County of Wake Board of Education, Eggimann v.	459
Covington, S. v.	250
Cox Armature Works, Norwood v.	288
Craver v. Insurance Co.	660
Crews, S. v.	171
Crouse, S. v.	47
Cummings, S. v.	452
Curtis, S. v.	606
Dais, S. v.	379
Dark, S. v.	566
David G. Allen Co., Freight Carriers v.	442
Davis, Meads v.	479
Daye, S. v.	195
Deese, S. v.	1
Dept. of Social Services, Browne v.	476
Dept. of Social Services v. Roberts	658
Dilldine, S. v.	229
Duke v. Insurance Co.	392
Duke Power Co. v. City of High Point	91
Duke Power Co., Morgan, Atty. General v.	497
Earle v. Wyrick	24
Eddleman, Long v.	43
Edwards, Hardy v.	276
Edwards, S. v.	535
Eggimann v. Board of Education	459
Electric Co. v. Newspapers, Inc.	519
Elliott, S. v.	334
Eure, Sec. of State, Commodities International, Inc. v.	723
Faire, S. v.	573
Faison, S. v.	508
Falkner v. Almon	643
First Citizens Bank & Trust Co. v. Larson	371
Fishel and Taylor v. Church	647
Food Stores v. Jones, Comr. of Revenue	272
Forbes v. Pillmon	69
Forsyth County Dept. of Social Services v. Roberts	658
Fowler, Lewis v.	199
Fowler, S. v.	144
Freight Carriers v. Allen Co.	442
Frinks, S. v.	584
Furr v. Furr	487
Gagne, S. v.	615
Gardner v. Insurance Co.	404
Gaston v. Smith	242
Gatlin, S. v.	71
General Building and Masonry Contractors, Strickland v.	729
Georgia Life & Health Insur- ance Co., Houser v.	398
Gibbs v. Heavlin	482
Glenn, S. v.	6
Golf, Inc. v. Wrecking Contractors	449
Great Atlantic and Pacific Tea Co., Tolbert v.	491
Greenlee, S. v.	489
Griffin v. Wheeler-Leonard & Co.	323
Grifton United Methodist Church, Fishel and Taylor v.	647
Grifton, Williams v.	611
Grose v. West	60
Gurkin, Brown v.	456
Hackett, S. v.	619
Haddock, Mewborn v.	285
Haliburton, Howell v.	40
Hall, S. v.	738
Hammock, S. v.	439
Harding, S. v.	66
Hardy v. Edwards	276
Harrell v. City of Winston-Salem	386
Harrington v. Harrington	419
Harrington, S. v.	473
Harris, S. v.	279
Harris, S. v.	332
Harris, S. v.	584
Harris, Thacker v.	103
Harrison, Board of Transportation v.	193
Hart, S. v.	738
Hartness v. Penny	75
Hayman v. Ross	624
Haywood, Wyatt v.	267
Heavlin, Gibbs v.	482
Henderson, S. v.	194

CASES REPORTED

	PAGE		PAGE
Hennie, In re.....	690	Kassouf, S. v.....	186
Henson, Carder v.....	318	Kennedy, Miller v.....	163
Hicks, S. v.....	554	Kennedy, Ragsdale v.....	509
High Point, Power Co. v.....	91	Ketchie, S. v.....	637
Highway Comm. v. Harrison.....	193	Kinston, Quadrant Corp. v.....	31
Hill v. Jones.....	189	Lachmann v. Baumann.....	160
Hinnant, S. v.....	53	Larson, Trust Co. v.....	371
Hodges v. Johnson.....	308	LaRue, S. v.....	358
Hogg & Allen, Rhodes v.....	548	Laws v. Laws.....	344
Hogg & Allen, Zimmerman v.....	544	Lawson v. Walker.....	295
Holder v. Moore.....	134	Leary v. Transit Company.....	702
Holley, S. v.....	504	Lee, S. v.....	4
Holloman v. Holloman.....	176	Lemons v. Lemons.....	303
Holshouser, Town of		Leonard, S. v.....	63
Wadesboro v.....	65	Letterlough, S. v.....	681
Holton, S. v.....	27	Lewis v. Fowler.....	199
Home Insurance Co. v. Tire Co.....	237	Life Homes, Inc., Parker v.....	297
Homes, Inc., Parker v.....	297	Littlejohn, S. v.....	305
Honeycutt, Hutchins v.....	527	Livingston, S. v.....	346
Hospital, Sides v.....	117	Logan, S. v.....	55
House v. House.....	686	Long v. Board of Adjustment.....	191
Houser v. Insurance Co.....	398	Long v. Eddleman.....	43
Houston v. Rivens.....	423	Lord v. Jeffreys.....	13
Howell v. Haliburton.....	40		
Howell v. Howell.....	634	McAuliffe, S. v.....	601
Howell v. Nichols.....	741	McCrowre, In re.....	245
Huffman, S. v.....	80	McMahan, Boyce v.....	254
Hutchins v. Honeycutt.....	527	McMillian, In re.....	245
Ingold Tire Co., Insurance Co. v.....	237	Martin, In re.....	225
In re Beatty.....	563	Marze S. v.....	628
In re Bullard.....	245	Mason v. Mason.....	494
In re Hennie.....	690	Massingale, S. v.....	197
In re McCrowre.....	245	Maxwell v. Perry.....	58
In re McMillian.....	245	May, S. v.....	71
In re Martin.....	225	Meads v. Davis.....	479
In re Meyers.....	11	Mecklenburg County Board of	
In re Owens.....	313	Comrs., In re.....	225
Insurance Co., Craver v.....	660	Meekins, Brantley v.....	683
Insurance Co., Duke v.....	392	Melton v. Melton.....	694
Insurance Co., Gardner v.....	404	Mewborn v. Haddock.....	285
Insurance Co., Houser v.....	398	Meyers, In re.....	11
Insurance Co. v. Tire Co.....	237	Miller v. Kennedy.....	163
		Mills, Carver v.....	745
Jeffreys, Lord v.....	13	Mitchell, S. v.....	663
Johnson, Hodges v.....	308	Moore, Brown v.....	445
Johnson, S. v.....	183	Moore Golf, Inc. v.....	
Johnson, S. v.....	590	Wrecking Contractors.....	449
Johnson v. Trust Co.....	8	Moore, Holder v.....	134
Jones, Comr. of Revenue, Food		Moore, S. v.....	640
Stores v.....	272	Moore, S. v.....	679
Jones, Hill v.....	189	Mooring, S. v.....	504

CASES REPORTED

PAGE	PAGE
Morgan, Atty. General v. Power Co.....	300
Morgan, Atty. General v. Power Co.....	497
Morris, Clemons v.....	76
Mutual Life Insurance Co., Duke v.....	392
Nationwide Life Insurance Co., Gardner v.....	404
Nationwide Mutual Insurance Co., Craver v.....	660
Neal v. Booth.....	415
Newsome v. Newsome.....	651
Newspapers, Inc., Electric Co. v.....	519
Nichols, Howell v.....	741
N. C. Board of Transportation v. Harrison.....	193
N. C. Comr. of Revenue, Food Stores v.....	272
N. C. State Highway Comm. v. Harrison.....	193
Norwood v. Works.....	288
Orange, S. v.....	220
Owens, In re.....	313
Page, S. v.....	435
Parker v. Homes, Inc.....	297
Parrish, S. v.....	171
Peace v. Broadcasting Corp.....	631
Peace Broadcasting Corp., Peace v.....	631
Peek, S. v.....	350
Penny, Hartness v.....	75
Perry, Maxwell v.....	58
Pillmon, Forbes v.....	69
Pilot Freight Carriers, Inc. v. Allen Co.....	442
Plymouth, S. v.....	262
Pollock, S. v.....	214
Potter v. Tyndall.....	129
Power Co. v. City of High Point	91
Power Co., Morgan, Atty. General v.....	300
Power Co., Morgan, Atty. General v.....	497
Proctor v. Weyerhaeuser Co.....	470
Propst, S. v.....	548
Quadrant Corp. v. City of Kinston.....	31
Ragsdale v. Kennedy.....	509
Raleigh, Taylor v.....	259
Rann, S. v.....	359
Rascoe, S. v.....	504
Reavis, S. v.....	499
Reeder, S. v.....	355
Reynolds, Chavis v.....	734
Rhodes v. Hogg & Allen.....	548
Richardson, S. v.....	355
Richmond Food Stores, Inc. v. Jones, Comr. of Revenue.....	272
Rivens, Houston v.....	423
Roberts, Dept. of Social Services v.....	658
Roberts, S. v.....	579
Rock v. Ballou.....	51
Rose's Stores, Inc., Shaw v.....	140
Ross, Hayman v.....	624
Russell, S. v.....	156
Safety Equipment Sales & Service, Inc. v. Williams.....	410
Sales & Service v. Williams.....	410
Sanderson, S. v.....	669
Sargent, S. v.....	148
Secretary of State, Commodities International, Inc. v.....	723
Shambley Wrecking Contrac- tors, Golf, Inc. v.....	449
Shaw v. Stores, Inc.....	140
Shumate, S. v.....	174
Sides v. Hospital.....	117
Simmons v. Simmons.....	68
Smith, Gaston v.....	242
Snuggs, S. v.....	361
Southern Bell Telephone and Telegraph Co., Utilities Comm. v.....	714
Sparks v. Choate.....	62
Stalls, S. v.....	265
Star News Newspapers, Inc., Electric Co. v.....	519
S. v. Aikens.....	310
S. v. Alexander.....	196
S. v. Armstrong.....	36
S. v. Askew.....	584
S. v. Averette.....	181
S. v. Barber.....	615
S. v. Beard.....	596
S. v. Bell.....	348
S. v. Benfield.....	330
S. v. Bennett.....	671

CASES REPORTED

	PAGE		PAGE
S. v. Billings	73	S. v. Harris	584
S. v. Birchfield	38	S. v. Hart	738
S. v. Blackwelder	18	S. v. Henderson	194
S. v. Blakely	337	S. v. Hicks	554
S. v. Boykins	34	S. v. Hinnant	53
S. v. Brake	342	S. v. Holley	504
S. v. Brinkley	339	S. v. Holton	27
S. v. Brown	38	S. v. Huffman	80
S. v. Buchanan	167	S. v. Johnson	183
S. v. Burgess	79	S. v. Johnson	590
S. v. Burnette	29	S. v. Kassouf	186
S. v. Burton	559	S. v. Ketchie	637
S. v. Butts	504	S. v. LaRue	358
S. v. Byrd	320	S. v. Lee	4
S. v. Camp	109	S. v. Leonard	63
S. v. Cannady	53	S. v. Letterlough	681
S. v. Canty	45	S. v. Littlejohn	305
S. v. Carr	573	S. v. Livingston	346
S. v. Carver	674	S. v. Logan	55
S. v. Clark	81	S. v. McAuliffe	601
S. v. Cloer	57	S. v. Marze	628
S. v. Cogdell	327	S. v. Massingale	197
S. v. Collins	590	S. v. May	71
S. v. Cook	353	S. v. Mitchell	663
S. v. Copeland	504	S. v. Moore	640
S. v. Covington	250	S. v. Moore	679
S. v. Crews	171	S. v. Mooring	504
S. v. Crouse	47	S. v. Orange	220
S. v. Cummings	452	S. v. Page	435
S. v. Curtis	606	S. v. Parrish	171
S. v. Dais	379	S. v. Peek	350
S. v. Dark	566	S. v. Plymouth	262
S. v. Daye	195	S. v. Pollock	214
S. v. Deese	1	S. v. Propst	548
S. v. Dilldine	229	S. v. Rann	359
S. v. Edwards	535	S. v. Rascoe	504
S. v. Elliott	334	S. v. Reavis	499
S. v. Faire	573	S. v. Reeder	355
S. v. Faison	508	S. v. Richardson	355
S. v. Fowler	144	S. v. Roberts	579
S. v. Frinks	584	S. v. Russell	156
S. v. Gagne	615	S. v. Sanderson	669
S. v. Gatlin	71	S. v. Sargent	148
S. v. Glenn	6	S. v. Shumate	174
S. v. Greenlee	489	S. v. Snuggs	361
S. v. Hackett	619	S. v. Stalls	265
S. v. Hall	738	S. v. Stone	352
S. v. Hammock	439	S. v. Strickland	196
S. v. Harding	66	S. v. Tatum	156
S. v. Harrington	473	S. v. Teat	484
S. v. Harris	279	S. v. Thomas	206
S. v. Harris	332	S. v. Thompson	178

CASES REPORTED

	PAGE		PAGE
S. v. Tillman	688	Town of Wadesboro	
S. v. Tuggle	701	v. Holshouser	65
S. v. Valentine	584	Transit Company, Leary v.....	702
S. v. Vester	16	Trust Co., Johnson v.....	8
S. v. Vickers	282	Trust Co. v. Larson	371
S. v. Walker	22	Tuggle, S. v.....	701
S. v. Walker	291	Tyndall, Potter v.....	129
S. v. Watson	540		
S. v. Weeks	360	Utilities Comm., Morgan, Atty.	
S. v. White	123	General v.....	300
S. v. White	357	Utilities Comm., Morgan, Atty.	
S. v. Whitley	666	General v.....	497
S. v. Wilkins	691	Utilities Comm. v. Telegraph Co.	714
S. v. Williams	465		
S. v. Williams	502	Valentine, S. v.....	584
S. v. Willis	465	Vester, S. v.....	16
S. v. Wills	77	Vickers, S. v.....	282
S. v. Woods	77	Virginia Electric and Power Co.,	
S. v. Wright	428	Morgan, Atty. General v.....	300
S. v. Wright	699		
S. v. Ziegler	628	Wachovia Bank & Trust Co.,	
S. ex rel. Utilities Comm.,		Johnson v.....	8
Morgan, Atty. General v.....	300	Wadesboro v. Holshouser	65
S. ex rel. Utilities Comm.,		Wake County Board of Educa-	
Morgan, Atty. General v.....	497	tion, Eggimann v.....	459
S. ex rel. Utilities Comm.		Walker, Lawson v.....	295
v. Telegraph Co.....	714	Walker, S. v.....	22
State Board of Transportation		Walker, S. v.....	291
v. Harrison	193	Watson, S. v.....	540
State Commissioner of Revenue,		Weeks, S. v.....	360
Food Stores v.....	272	Wentz, Ballance v.....	363
State Highway Comm.		West, Grose v.....	60
v. Harrison	193	Weyerhaeuser Co., Proctor v....	470
Stone, S. v.....	352	Wheeler-Leonard & Co.,	
Stores, Inc., Shaw v.....	140	Griffin v.....	323
Strickland v. Contractors, Inc.	729	White, Burkhead v.....	432
Strickland, S. v.....	196	White, S. v.....	123
Swanson v. Swanson	152	White, S. v.....	357
		Whitley, S. v.....	666
Tatum, S. v.....	156	Whittenton, Barringer &	
Taylor v. City of Raleigh	259	Gaither, Inc. v.....	316
Tea Co., Tolbert v.....	491	Wilkins, S. v.....	691
Teat, S. v.....	484	Williams, Clark v.....	341
Telegraph Co., Utilities		Williams, Sales & Service v....	410
Comm. v.....	714	Williams v. Town of Grifton...	611
Thacker v. Harris	103	Williams, S. v.....	465
Thomas, S. v.....	206	Williams, S. v.....	502
Thompson, S. v.....	178	Willis, S. v.....	465
Tillman, S. v.....	688	Wills, S. v.....	77
Tire Co., Insurance Co. v.....	237	Winston-Salem Board of Ad-	
Tolbert v. Tea Co.....	491	justment, Long v.....	191
Town of Grifton, Williams v.....	611	Winston-Salem, Harrell v.....	386

CASES REPORTED

	PAGE		PAGE
Woods, S. v.....	77	Wyatt v. Haywood.....	267
Works, Norwood v.....	288	Wyrick, Earle v.....	24
Wrecking Contractors, Golf, Inc. v.....	449		
Wright, S. v.....	428	Ziegler, S. v.....	628
Wright, S. v.....	699	Zimmerman v. Hogg & Allen....	544

GENERAL STATUTES CITED AND CONSTRUED

G.S.

1-22	Johnson v. Trust Co., 8
1-52	Brantley v. Meekins, 683
1-53(4)	Johnson v. Trust Co., 8
1-79	Golf, Inc. v. Wrecking Contractors, 449
1-105	House v. House, 686
1-116(a)	Lord v. Jeffreys, 13
1-180	S. v. Dark, 566
	S. v. Frinks, 584
	S. v. Whitley, 666
1-277(b)	Sides v. Hospital, 117
1-315(a)(4)	Fishel and Taylor v. Church, 647
1A-1	See Rules of Civil Procedure infra
6-21.2(5)	Trust Co. v. Larson, 371
7A-29	Morgan, Atty. Gen. v. Power Co., 497
7A-61	State v. Page, 435
7A-271(a)(3)	State v. White, 123
7A-280	In re Bullard, 245
7A-288	Browne v. Dept. of Social Services, 476
7A-289	In re Meyers, 11
12-214	State v. Walker, 291
14-62	State v. Sargent, 148
14-71	State v. Burnette, 29
14-190.2(h)	State v. Hart, 738
14-288.4(a)(2)	State v. Clark, 81
	State v. Orange, 220
14-288.4(a)(3), (4), (5)b	State v. Orange, 220
14-288.5	State v. Clark, 81
	State v. Orange, 220
14-292	State v. Kassouf, 186
14-360	State v. Fowler, 144

GENERAL STATUTES CITED AND CONSTRUED

G.S.

15-41(1),(2)	State v. Faire, 573
15-152	State v. White, 123
15-155.4	State v. White, 123
15-200	State v. Benfield, 330
15-205.1	State v. Benfield, 330
20-141(c)	Wyatt v. Haywood, 267
20-150(a)	Wyatt v. Haywood, 267
20-174(a)	Brooks v. Boucher, 676
20-174.1	State v. Frinks, 584
20-183(a)	State v. Dark, 566
20-217	Holder v. Moore, 134
25-2-508	Meads v. Davis, 479
25-3-606	Trust Co. v. Larson, 371
31A-11(b)	Gardner v. Insurance Co., 404
44A-12(b)	Strickland v. Contractors, Inc., 729
50-10	Laws v. Laws, 344
50-13.5(c)(5)	Swanson v. Swanson, 152
50-16.3	Newsome v. Newsome, 651
55-132(a)	Utilities Comm. v. Telegraph Co., 714
62-1 et seq.	Power Co. v. City of High Point, 91
62-3(23)d	Power Co. v. City of High Point, 91
62-38	Power Co. v. City of High Point, 91
62-118	Power Co. v. City of High Point, 91
Ch. 66, Art. 8	Utilities Comm. v. Telegraph Co., 714
78-2(g)	Commodities International v. Eure, 723
90-95(d)	State v. Gagne, 615
96-13(3)	In re Beatty, 563
105-113.56A	Food Stores v. Jones, 272
105-275	In re Martin, 225
106-50.7(e)(4)	Potter v. Tyndall, 129
143-318.1 et seq.	Eggimann v. Board of Education, 459

GENERAL STATUTES CITED AND CONSTRUED

G.S.

148-45	State v. Stone, 352
160A-286	State v. Dark, 566
160A-311	Power Co. v. City of High Point, 91
160A-319	Power Co. v. City of High Point, 91
160A-388 (e)	Quadrant Corp. v. City of Kinston, 31
160A-446	Harrell v. City of Winston-Salem, 386

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.

4(j)9	House v. House, 686
6(a)	Howell v. Howell, 634
6(e)	Howell v. Howell, 634
8	Ragsdale v. Kennedy, 509
9(b)	Ragsdale v. Kennedy, 509
15(b)	Thacker v. Harris, 103
18	Gibbs v. Heavlin, 482
26(d)	Miller v. Kennedy, 163
55(d)	Howell v. Haliburton, 40
58	Barringer & Gaither, Inc. v. Whittenton, 316
60	Browne v. Dept. of Social Services, 476
60(b) (1)	Mason v. Mason, 494

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

Art. I, § 8	Food Stores v. Jones, Comr. of Revenue, 272
	Utilities Comm. v. Telegraph Co., 714
Amendment I	State v. Clark, 81
Amendment XIV	State v. Clark, 81

**RULES OF PRACTICE
CITED AND CONSTRUED**

No. 5	Clark v. Williams, 341
	State v. Peek, 350
	Melton v. Melton, 694
	Campbell v. Campbell, 696
No. 19	In re Hennie, 690
No. 28	State v. Tillman, 688
	In re Hennie, 690

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
Arnold v. Distributors and Wilson v. Distributors	21 N.C. App. 579	Denied, 285 N.C. 658
Brooks v. Brooks	22 N.C. App. 507	Denied, 285 N.C. 658
Brown v. Moore	22 N.C. App. 445	Allowed, 285 N.C. 756
Burkhead v. White	22 N.C. App. 432	Denied, 285 N.C. 756
Carver v. Mills	22 N.C. App. 745	Denied, 285 N.C. 756
Duke v. Insurance Co.	22 N.C. App. 392	Allowed, 285 N.C. 756
Earle v. Wyrick	22 N.C. App. 24	Allowed, 285 N.C. 658
Eggimann v. Board of Education	22 N.C. App. 459	Denied, 285 N.C. 756
Electric Co. v. Newspapers, Inc.	22 N.C. App. 519	Denied, 285 N.C. 757
Furr v. Furr	22 N.C. App. 487	Denied, 285 N.C. 757
Gardner v. Insurance Co.	22 N.C. App. 404	Denied, 285 N.C. 658
Gaston v. Smith	22 N.C. App. 242	Denied, 285 N.C. 658
Griffin v. Wheeler-Leonard & Co.	22 N.C. App. 323	Allowed, 285 N.C. 659
Hardy v. Edwards	22 N.C. App. 276	Denied, 285 N.C. 659
Harrell v. City of Winston-Salem	22 N.C. App. 386	Denied, 285 N.C. 757
Harrington v. Harrington	22 N.C. App. 419	Allowed, 285 N.C. 757
Hinson v. Creech	21 N.C. App. 727	Allowed, 285 N.C. 659
Holloman v. Holloman	22 N.C. App. 176	Denied, 285 N.C. 659
In re Beatty	22 N.C. App. 563	Allowed, 285 N.C. 757
In re Bullard	22 N.C. App. 245	Appeal Dismissed, 285 N.C. 758
In re Hennie	22 N.C. App. 690	Denied, 285 N.C. 758
In re Martin	22 N.C. App. 225	Allowed, 285 N.C. 659
Insurance Co. v. Tire Co.	22 N.C. App. 237	Allowed, 285 N.C. 758
Johnson v. Hooks	21 N.C. App. 585	Denied, 285 N.C. 660
Lachmann v. Baumann	22 N.C. App. 160	Denied, 285 N.C. 660
Lewis v. Fowler	22 N.C. App. 199	Denied, 285 N.C. 660
Long v. Eddleman	22 N.C. App. 43	Denied, 285 N.C. 660
Mewborn v. Haddock	22 N.C. App. 285	Denied, 285 N.C. 660
Miller v. Kennedy	22 N.C. App. 163	Denied, 285 N.C. 661

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
Morgan, Atty. General v. Power Co.	22 N.C. App. 300	Denied, 285 N.C. 758 Appeal Dismissed
Morgan, Atty. General v. Power Co.	22 N.C. App. 497	Denied, 285 N.C. 759 Appeal Dismissed
Potter v. Tyndall	22 N.C. App. 129	Denied, 285 N.C. 661
Power Co. v. City of High Point	22 N.C. App. 91	Denied, 285 N.C. 661
Proctor v. Weyerhaeuser Co.	22 N.C. App. 470	Denied, 285 N.C. 759
Redmon v. Guaranty Co.	21 N.C. App. 704	Denied, 285 N.C. 661
Rock v. Ballou	22 N.C. App. 51	Allowed, 285 N.C. 661
Sides v. Hospital	22 N.C. App. 117	Allowed, 285 N.C. 662
Sparks v. Choate	22 N.C. App. 62	Denied, 285 N.C. 662
State v. Aikens	22 N.C. App. 310	Allowed, 285 N.C. 662
State v. Alexander	22 N.C. App. 196	Denied, 285 N.C. 662
State v. Benfield	22 N.C. App. 330	Denied, 285 N.C. 662 Appeal Dismissed
State v. Blackwelder	22 N.C. App. 18	Denied, 285 N.C. 663
State v. Brake	22 N.C. App. 342	Denied, 285 N.C. 663
State v. Brinkley	22 N.C. App. 339	Denied, 285 N.C. 663
State v. Byrd	22 N.C. App. 320	Denied, 285 N.C. 663
State v. Camp	22 N.C. App. 109	Allowed, 285 N.C. 663
State v. Cannady and Hinnant	22 N.C. App. 53	Denied, 285 N.C. 664
State v. Canty	22 N.C. App. 45	Denied, 285 N.C. 664
State v. Carroll	21 N.C. App. 530	Denied, 285 N.C. 759
State v. Carver	22 N.C. App. 674	Allowed, 285 N.C. 759
State v. Clark	22 N.C. App. 81	Appeal Dismissed, 285 N.C. 760
State v. Cloer	22 N.C. App. 57	Denied, 285 N.C. 592
State v. Cogdell	22 N.C. App. 327	Denied, 285 N.C. 664
State v. Collins	19 N.C. App. 553	Denied, 285 N.C. 664
State v. Collins	22 N.C. App. 590	Denied, 285 N.C. 760
State v. Cummings	22 N.C. App. 452	Denied, 285 N.C. 760
State v. Curtis	22 N.C. App. 606	Denied, 285 N.C. 760
State v. Dais	22 N.C. App. 379	Denied, 285 N.C. 664 Appeal Dismissed

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
State v. Dark	22 N.C. App. 566	Denied, 285 N.C. 760
State v. Elliott	22 N.C. App. 334	Appeal Dismissed, 285 N.C. 761
State v. Feimster	21 N.C. App. 602	Denied, 285 N.C. 665
State v. Frinks	22 N.C. App. 584	Appeal Dismissed, 285 N.C. 761
State v. Gagne	22 N.C. App. 615	Denied, 285 N.C. 761
State v. Gray	21 N.C. App. 63	Denied, 285 N.C. 665
State v. Greenlee	22 N.C. App. 489	Appeal Dismissed, 285 N.C. 761
State v. Hammock	22 N.C. App. 439	Denied, 285 N.C. 665
State v. Harding	22 N.C. App. 66	Denied, 285 N.C. 665
State v. Harris	21 N.C. App. 697	Denied, 285 N.C. 665
State v. Hicks	22 N.C. App. 554	Denied, 285 N.C. 761
State v. King and McDougald	21 N.C. App. 549	Denied, 285 N.C. 666
State v. Lisk	21 N.C. App. 474	Denied, 285 N.C. 666
State v. Livingston	22 N.C. App. 346	Denied, 285 N.C. 762
State v. Logan	22 N.C. App. 55	Denied, 285 N.C. 666 Appeal Dismissed
State v. McAuliffe	22 N.C. App. 601	Denied, 285 N.C. 762 Appeal Dismissed
State v. Moore	21 N.C. App. 557	Appeal Dismissed, 285 N.C. 666
State v. Moore	22 N.C. App. 640	Appeal Dismissed, 285 N.C. 762
State v. Moore	22 N.C. App. 679	Denied, 285 N.C. 762
State v. Orange	22 N.C. App. 220	Appeal Dismissed, 285 N.C. 762
State v. Page	22 N.C. App. 435	Denied, 285 N.C. 763 Appeal Dismissed
State v. Pierce	21 N.C. App. 451	Appeal Dismissed 285 N.C. 666
State v. Richards	21 N.C. App. 686	Denied, 285 N.C. 667 Appeal Dismissed
State v. Russell and Tatum	22 N.C. App. 156	Denied, 285 N.C. 667 Appeal Dismissed
State v. Sasser	21 N.C. App. 618	Denied, 285 N.C. 667

<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
State v. Shelton	21 N.C. App. 662	Denied, 285 N.C. 667
State v. Stalls	22 N.C. App. 265	Denied, 285 N.C. 763 Appeal Dismissed
State v. Teat	22 N.C. App. 484	Denied, 285 N.C. 667
State v. Thomas	22 N.C. App. 206	Appeal Dismissed, 285 N.C. 763
State v. Turner	21 N.C. App. 608	Denied, 285 N.C. 668 Appeal Dismissed
State v. Vester	22 N.C. App. 16	Denied, 285 N.C. 668
State v. Vickers	22 N.C. App. 282	Denied, 285 N.C. 668
State v. Weeks	22 N.C. App. 360	Denied, 285 N.C. 668
State v. White	22 N.C. App. 123	Denied, 285 N.C. 668
State v. Whitted	21 N.C. App. 649	Denied, 285 N.C. 669
State v. Woods	22 N.C. App. 77	Appeal Dismissed, 285 N.C. 763
Taylor v. City of Raleigh	22 N.C. App. 259	Allowed, 285 N.C. 669
Wyatt v. Haywood	22 N.C. App. 267	Allowed, 285 N.C. 669; Appeal Withdrawn 285 N.C. 763

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

<i>Case</i>	<i>Reported</i>	<i>Disposition on Appeal</i>
Ballance v. Wentz	22 N.C. App. 363	Pending
Boyce v. McMahan	22 N.C. App. 254	285 N.C. 730
Highway Comm. v. Helderman	20 N.C. App. 394	285 N.C. 645
Hutchins v. Honeycutt	22 N.C. App. 527	Pending
In re Estate of Loftin and Loftin v. Loftin	21 N.C. App. 627	285 N.C. 717
Insurance Co. v. Tire Co.	22 N.C. App. 237	Pending
Little v. Rose	21 N.C. App. 596	285 N.C. 724
Ragsdale v. Kennedy	22 N.C. App. 509	Pending
Railway Co. v. Werner Industries	21 N.C. App. 116	Pending
Rhodes v. Hogg & Allen	22 N.C. App. 548	Pending
State v. Edwards	22 N.C. App. 535	Pending
Zimmerman v. Hogg & Allen	22 N.C. App. 544	Pending

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JAMES DEXTER DEESE

No. 7416SC276

(Filed 5 June 1974)

Automobiles § 113— manslaughter — sufficiency of evidence

Evidence in a manslaughter case was insufficient to be submitted to the jury where it tended to show that defendant drove his vehicle in a culpably negligent manner, but it did not show that decedent's death was connected in any way with the manner in which defendant operated his automobile.

APPEAL by defendant from *McKinnon, Judge*, 13 November 1973 Session of Superior Court held in ROBESON County. Argued in the Court of Appeals 8 May 1974.

Defendant was charged in a bill of indictment with the felony of manslaughter. From a verdict of guilty, and judgment of imprisonment entered thereon, defendant appealed.

Attorney General Morgan, by Assistant Attorney General League, for the State.

C. Christopher Smith for the defendant.

BROCK, Chief Judge.

The only evidence in this case is that offered by the State. The theory of the State's case is that defendant was culpably

State v. Deese

negligent in the operation of his automobile. Presumably, the further theory of the State's case is that defendant's culpable negligence was in some manner the proximate cause of the death of Claudie D. Lowery. It appears that the evidence makes out a case of culpable negligence against defendant in the operation of his automobile, but we are unable to find from the evidence that decedent's death is connected in any way with the manner in which defendant operated his automobile.

The State's evidence tends to show that defendant was observed as he got into his Ford Maverick on the driver's side and drove away from a service station. The record is silent as to whether anyone was in defendant's automobile other than defendant. Defendant was observed driving away from the service station, accelerating to a high speed, and disappearing around a curve in the highway. The evidence tends to show that the curve was to the right in the direction in which defendant was traveling. From testimony describing skid marks, the evidence tends to show that defendant's Ford Maverick ran off the left side of the paved portion of the road, pulled back into the paved portion and then off the right side of the paved portion, ran into a tree, and came to rest against or near the back end of a Ford Mustang. A Volkswagen was twenty to twenty-five feet in front of, and almost broadside to, the Ford Mustang. The witness who observed defendant drive away from the service station almost immediately proceeded in the same direction and, after he rounded the curve, came upon the scene of defendant's wrecked automobile. The deceased was found lying against the right front wheel of the Volkswagen.

The record is silent upon the question of whether the Ford Mustang and the Volkswagen were on or off the highway, or why they were in their location. Although we find nothing in the record which would prompt the trial judge to make inquiry about another accident, the following appears:

"COURT: 'May I ask you this, Mr. Locklear: Was the car that you saw—you said that the other man was lying beside a Volkswagen. Was that the car that had been in the wreck of another car?'

"WITNESS: 'That was the car in the wreck.'

"COURT: 'The car in the wreck was the Volkswagen?'

"WITNESS: 'Yes, sir.' "

State v. Deese

Immediately thereafter the following appears:

"COURT: 'The car you say the defendant got into was a Volkswagen, the one he was driving?'"

"WITNESS: 'No. It was a Maverick.'"

"COURT: 'Maverick. And you said the man was lying next to a Volkswagen?'"

"WITNESS: 'Dexter was lying inside of his car, and the other fellow was lying up on the front of a Volkswagen.'"

"COURT: 'A different car than the one that Dexter had been driving?'"

"WITNESS: 'Yes, sir.'"

"COURT: 'I see. All right. Thank you.'"

From this bit of testimony, an inference arises that the Ford Mustang and the Volkswagen had been involved in a collision before the defendant's Ford Maverick went out of control.

The picture of the scene as presented by the testimony and by the photographs shows defendant's severely damaged Ford Maverick resting near or against the rear of a Ford Mustang, and a Volkswagen which had been involved in an accident, sitting twenty to twenty-five feet in front of and almost perpendicular to the Ford Mustang. The defendant was lying "inside" or "beside" his car, and the deceased was lying against the right front wheel of the Volkswagen.

In the record before us, the only suggestion that the deceased may have been a passenger in defendant's Ford Maverick, or may have been a pedestrian who was struck by defendant's car, or may have been a passenger in another car which was struck by defendant's vehicle, or may have been in any way injured as a proximate result of the operation of defendant's Ford Maverick, is found in the allegations of the warrant and the bill of indictment. Obviously, these allegations have no part in making out a case against defendant.

Defendant's motion for nonsuit should have been allowed.

Reversed.

Judges PARKER and BAILEY concur.

State v. Lee

STATE OF NORTH CAROLINA v. CLARENCE WADY LEE, JR.

No. 7412SC397

(Filed 5 June 1974)

1. Criminal Law § 131— new trial for newly discovered evidence — time for filing motion

A motion for a new trial in a criminal case on the ground of newly discovered evidence may be filed in the superior court at either the session during which the case was tried or at the next succeeding session following certification of affirmation of the trial court's judgment on appeal.

2. Criminal Law § 131— new trial for newly discovered evidence — discretion of court — appeal

An appeal does not lie from a discretionary determination of a motion for a new trial for newly discovered evidence.

APPEAL by defendant from an Order of *Braswell, Judge*, entered during the 26 November 1973 Session of Superior Court held in CUMBERLAND County, denying defendant's motion for a new trial for newly discovered evidence. Heard in the Court of Appeals 8 May 1974.

Attorney General Morgan, by Associate Attorney Rutledge, for the State.

Faircloth & Fleishman, by Neill H. Fleishman, for the defendant.

BROCK, Chief Judge.

On 17 January 1973, defendant was convicted in the Superior Court of Cumberland County of two felonies of involuntary manslaughter. Notice of appeal was timely entered and an appeal was perfected to the North Carolina Court of Appeals.

By opinion filed 27 June 1973, the Court of Appeals found no error. *State v. Lee*, 18 N.C. App. 580, 197 S.E. 2d 229. By Order entered 31 August 1973, the Supreme Court of North Carolina denied defendant's petition for writ of certiorari. *State v. Lee*, 283 N.C. 756, 198 S.E. 2d 726. Said Order of the Supreme Court of North Carolina was certified to the Superior Court of Cumberland County on 7 September 1973.

The next session of Superior Court of Cumberland County for the trial of criminal cases, following the certification of the Order of the Supreme Court, was a three week session which

State v. Lee

commenced on Monday, 17 September 1973. On 31 October 1973, defendant filed a motion for a new trial on the grounds of newly discovered evidence. Under the law in this State, the motion for a new trial on the grounds of newly discovered evidence was not timely filed, and Judge Braswell should not have entertained the motion.

[1] It has long been the law in this State that a motion for a new trial in a criminal case on the ground of newly discovered evidence cannot be made in the appellate division. Such a motion may be made in the superior court, but it may be filed there at only two sessions (formerly designated terms). The motion may be filed at the session during which the trial was held, and, if the case is kept alive by appeal, such motion may be filed at the next succeeding session following certification of affirmance of the trial court's judgment on appeal. *State v. Pate*, 19 N.C. App. 701, 200 S.E. 2d 217; *State v. Thomas*, 3 N.C. App. 223, 164 S.E. 2d 391; *State v. Morrow*, 262 N.C. 592, 138 S.E. 2d 245; *State v. Smith*, 245 N.C. 230, 95 S.E. 2d 576; *State v. Edwards*, 205 N.C. 661, 172 S.E. 399; *State v. Casey*, 201 N.C. 620, 161 S.E. 81; 7 Strong, N. C. Index 2d, Trial, § 49, p. 365.

The purported appeal in this case must be dismissed for two reasons.

The motion for a new trial on the grounds of newly discovered evidence was not filed at either the session during which the case was tried, or at the next succeeding session following certification of affirmance on appeal and therefore, Judge Braswell had no authority to entertain the motion.

[2] A motion for a new trial on the grounds of newly discovered evidence is addressed to the discretion of the trial court. 1 Strong, N. C. Index 2d, Appeal and Error, § 54, p. 213. An appeal does not lie from a discretionary determination of an application for a new trial for newly discovered evidence. *State v. Williams*, 244 N.C. 459, 94 S.E. 2d 374; *State v. Ferrell*, 206 N.C. 738, 175 S.E. 91; *State v. Moore*, 202 N.C. 841, 163 S.E. 700.

Appeal dismissed.

Judges PARKER and BAILEY concur.

State v. Glenn

STATE OF NORTH CAROLINA v. BENNIE LEE GLENN

No. 7414SC406

(Filed 5 June 1974)

Homicide § 4; Criminal Law § 26— felony-murder charge— kidnapping, assault, robbery charges— no merger

Where defendant was charged in four separate bills of indictment with kidnapping, felonious assault, armed robbery, and murder in the perpetration of a felony, and was convicted of all charges except the felony-murder, there was no merger of the three felony charges into the felony-murder accusation, and the trial court properly denied defendant's motion in arrest of judgment on the felony charges.

THIS case was heard on *certiorari* to review the trial and judgment of *Cooper, Judge*, at the 5 June 1972 Session, DURHAM Superior Court.

Heard in the Court of Appeals 28 May 1974.

Defendant was tried on four separate bills of indictment, each proper in form.

The first was in the form prescribed by G.S. 15-144 for the murder of William Thomas Land, a deputy sheriff of Durham County. This bill charged that defendant feloniously and of his malice aforethought, did kill and murder. The bill further charged that the murder occurred during the commission of a felony by the defendant.

The second bill charged the defendant with kidnapping one W. Holt Anderson, Branch Manager of the Wachovia Bank and Trust Company.

The third bill charged the defendant with a felonious assault upon one Jerry Wilkerson, a deputy sheriff of Durham County, by firing a 30 caliber carbine rifle at him with intent to kill, the said Wilkerson at the time being in the performance of his official duties.

The fourth bill charged the defendant with armed robbery of Wachovia Bank and Trust Company.

The four bills of indictment were consolidated for the purpose of trial. The defendant was found guilty by the jury on three of the charges, namely, kidnapping, felonious assault, and armed robbery. The jury was unable to agree on the charge of murder, and a mistrial was entered.

State v. Glenn

From consecutive judgments entered on the three charges for which the defendant was convicted, the defendant excepted and noted an appeal. Because of the inability of defendant to perfect the appeal within the time prescribed by the rules of this Court, we granted certiorari to review the trial and judgments.

Attorney General Robert Morgan by Assistant Attorney General James L. Blackburn for the State.

Pearson, Malone, Johnson, DeJarmon and Spaulding by C. C. Malone, Jr., for defendant appellant.

CAMPBELL, Judge.

The evidence reveals that on the morning of 5 October 1971, there were four employees in the Nelson Branch of the Wachovia Bank and Trust Company. Shortly after noon on that day the defendant entered the bank when no other persons other than the employees were present. The defendant was carrying a rifle and ordered the tellers to fill up a burlap bag which he was carrying. The defendant then ordered the employees to enter a closet. Before the defendant left the bank, an automobile belonging to the Sheriff's Department drove into the parking lot. Deputy Sheriff Land and Deputy Sheriff Wilkerson got out of the automobile and approached the bank. The defendant opened fire on them with the rifle. Deputy Sheriff Wilkerson returned the fire with a pistol. During the interchange of shots, Deputy Sheriff Land was killed. The defendant then ordered Anderson, the Branch Manager of the bank, to come out of the closet and accompany the defendant to the bank's automobile which was driven by Anderson. The defendant then directed Anderson where to drive the automobile with the defendant riding in the front passenger seat, the defendant at the time carrying the burlap bag containing the money from the bank. After riding in the automobile for several miles, the automobile was stopped by State Highway Patrolmen, and the defendant was apprehended.

The defendant brings forward one assignment of error, namely, the failure to sustain his motion in arrest of judgment subsequent to the declaration of a mistrial upon the felony murder charge. The defendant says that when he was placed on trial for first-degree murder, the three felony charges were merged into that charge; and it was improper to pronounce

Johnson v. Trust Co.

judgment on those three charges as they had been merged into the murder charge. We find no merit in this assignment of error.

The defendant has not been convicted of murder; and without a conviction of murder, there can be no merger of a felony charge in a felony murder accusation. It is also to be noted that in the instant case the bill of indictment not only charges a felony murder situation, but also charges that the defendant "feloniously and of his malice aforethought, did kill and murder."

The question of whether there is a merger will not arise until and unless the State attempts to try the defendant on a felony murder charge.

For an application of the merger doctrine in felony murder cases, see *State v. Bell*, 205 N.C. 225, 171 S.E. 50 (1933) and *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972).

No error.

Chief Judge BROCK and Judge BRITT concur.

DORIS OVERMAN JOHNSON, ADMINISTRATRIX OF THE ESTATE OF JACK JOHNSON, DECEASED v. WACHOVIA BANK & TRUST CO., EXECUTOR OF THE ESTATE OF RAIFORD D. BAXLEY, DECEASED

No. 7418SC244

(Filed 5 June 1974)

1. Death § 4; Executors and Administrators § 2— wrongful death action — foreign administratrix — running of statute of limitations

A wrongful death action cannot be maintained by a foreign administratrix, and commencement of a wrongful death action in N. C. by a foreign administrator will not operate to bar the running of the applicable two-year statute of limitations set forth in G.S. 1-53(4), such action being a nullity and subject to dismissal.

2. Death § 4— wrongful death action — failure to qualify as administratrix in apt time — claim barred

Where plaintiff's intestate died on 30 April 1970 and plaintiff brought a wrongful death action against the estate of the doctor whose negligence allegedly caused the death on 30 May 1972, G.S. 1-22, which extends the statute of limitations in suits against a defendant's estate up to one year after the issuance of letters of administration for said defendant's estate, was of no avail to plaintiff, since defendant qualified as executor of the doctor's estate on 24 June

Johnson v. Trust Co.

1971, but plaintiff did not qualify as administratrix of her intestate's estate in N. C. until 2 May 1973.

APPEAL by plaintiff from *Lupton, Judge*, at the 28 May 1973 Civil Session of GUILFORD Superior Court.

Heard in the Court of Appeals 6 May 1974.

This is a wrongful death action instituted in North Carolina against the estate of Dr. Raiford D. Baxley, deceased physician, who allegedly was negligent in his treatment of Jack Johnson. Johnson had been injured in a fall, and it was alleged that his death was caused by the negligence of Dr. Baxley. Mr. Johnson died in North Carolina on 30 April 1970. Doris Overman Johnson, decedent's wife, qualified as administratrix of deceased's estate in Florida on 26 May 1970. Dr. Baxley died on 16 June 1971 and defendant, in this action, qualified as executor of his estate on 24 June 1971. This suit was commenced on 30 May 1972. On 1 May 1973, defendant filed a motion to dismiss and a motion for summary judgment on the ground that the plaintiff was a foreign administratrix and as such had no authority to institute an action in North Carolina. On 2 May 1973, Doris Overman Johnson Smith qualified as administratrix of Mr. Johnson's estate in Guilford County, North Carolina. On 16 May 1973, plaintiff, without showing a change in name, filed a motion to amend her complaint explaining that she had not been advised that she needed to qualify as administratrix in North Carolina as well as in Florida, and that upon learning of her faulty qualification, she immediately qualified in North Carolina as administratrix of the estate of Jack Johnson. Plaintiff's motion prayed that the trial court allow her to amend her complaint to show her qualification in North Carolina and to hold that such qualification related back to the date of the filing of this action. After a hearing on the matter, the trial court denied plaintiff's motion to amend the complaint, granted defendant's motion for summary judgment, and dismissed the action for failure to state a claim upon which relief may be granted. Plaintiff appealed.

Edwards, Greeson and Toumaras by Harold F. Greeson for plaintiff appellant.

Henson, Donahue and Elrod by Joseph E. Elrod, III, for defendant appellee.

Johnson v. Trust Co.

CAMPBELL, Judge.

[1] G.S. 28-173 provides in pertinent part:

“When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent, . . .”

A wrongful death action cannot be maintained by a foreign administratrix, and commencement of a wrongful death action in North Carolina by a foreign administrator will not operate to bar the running of the applicable two-year statute of limitations set forth in G.S. 1-53(4), such action being a nullity and subject to dismissal. *Merchants Distributors, Inc. v. Hutchinson and Lewis v. Hutchinson*, 16 N.C. App. 655, 193 S.E. 2d 436 (1972); *Monfils v. Hazlewood*, 218 N.C. 215, 10 S.E. 2d 673 (1940); *Reid v. Smith*, 5 N.C. App. 646, 169 S.E. 2d 14 (1969).

[2] G.S. 1-22, which extends the statute of limitations in suits against a defendant's estate up to one year after the issuance of letters of administration for said defendant's estate, is also of no avail to plaintiff in this case since she did not qualify and file suit within that time limit. Finally, plaintiff's qualification on 2 May 1973 did not relate back to the filing of the suit where no attempt has been made to qualify as administrator in North Carolina. *Reid v. Smith, supra*. This case is distinguishable from *Graves v. Welborn*, 260 N.C. 688, 133 S.E. 2d 761 (1963), in that there the plaintiff attempted to qualify and did qualify in every respect except having the signature of the surety on the surety bond. In *Graves v. Welborn, supra*, the Court stated:

“ . . . However, we must not be understood as holding that one who has never applied for letters or who, having applied, had no reasonable grounds for believing that he had been duly appointed, can institute an action for wrongful death, or any other cause, upon a false allegation of appointment and thereafter validate that allegation by a subsequent appointment. . . .”

In the case at bar there was no substantial compliance as there had been in *Graves v. Welborn, supra*. The trial court did not

In re Meyers

err in granting the defendant's motion for summary judgment and for dismissal for failure to state a claim upon which relief could be granted.

No error.

Judges MORRIS and VAUGHN concur.

IN THE MATTER OF: TONY MEYERS, Age 13

No. 7419DC383

(Filed 5 June 1974)

Appeal and Error § 6; Infants § 10— adjudication of delinquency — continuance of disposition — premature appeal

Appeal from adjudication of delinquency is dismissed as premature where the court continued disposition until a specific date to give the court counselor an opportunity to conduct a home study since the appeal should be deferred until the disposition where the time between the adjudication and disposition is short, reasonable, and for a specific purpose. G.S. 7A-289.

APPEAL by defendant juvenile from *Hammond, District Judge*, at the 10 December 1973 Session of RANDOLPH District Court.

Heard in the Court of Appeals 6 May 1974.

On 2 October 1973, Randolph County Deputy Sheriff R. C. Ward swore out a juvenile petition against Tony Meyers, age 13, charging him with the crime of breaking and entering the residence of Stamey Pierce in violation of G.S. 14-54(b). Mr. Allen Poole is the brother-in-law of and lives next door to Stamey Pierce. On the night of 2 October 1973, Mr. Poole noticed the lights in the Pierce home go on and off. Mr. Poole went to the front door of the Pierce home to investigate and heard someone running inside and the television blaring. Mr. Poole unlocked the door, walked through the house and found two bicycles near the back door. Mr. Poole called to his wife to notify the sheriff, then he rolled the bicycles around to the carport. When Mr. Poole returned to the back of the Pierce home, he saw two boys standing where the bicycles had been. The two boys fled and were later apprehended by Deputy Sheriff Ward. The boys were questioned by Deputy Sheriff Ward and Mrs. Pierce

In re Meyers

at which time they admitted being in the Pierce home. The trial court found the defendant to be a delinquent and continued disposition of the matter until a later date to give the court counselor an opportunity to conduct a home study. Defendant appealed from the adjudication of delinquency.

Attorney General Robert Morgan by Assistant Attorneys General William Woodward Webb and Ann Reed for the State.

Ottway Burton for juvenile defendant appellant.

CAMPBELL, Judge.

G.S. 7A-289 reads in pertinent part:

“Any child, parent, guardian, custodian or agency who is a party to a proceeding under this Article may appeal from an *adjudication or any order of disposition* to the Court of Appeals, provided that notice of appeal is given in open court at the time of the hearing or in writing within 10 days after the hearing. . . .” (Emphasis supplied.)

The statute is intended to remedy the long-standing practice of indefinite continuations of disposition of juvenile cases. This practice held the juvenile under the constant threat of incarceration and subject to public disdain but did not allow an appeal until his case was recalled for final disposition. This particular case does not fit that fact pattern. Here we have an order dated 10 December 1973 and filed 12 December 1973, reading:

“This matter is continued until January 14, 1974, for disposition and the court counselor is ordered to conduct a home study and report to the court in writing on or before that date.”

This is short and reasonable, and for a specific purpose (to conduct a home study). Where the time lapse between adjudication and order of disposition is short and reasonable and for a specific purpose, we think the appeal should be deferred until the disposition. Otherwise, unnecessary appeals would be encouraged, and the Court would be unnecessarily delayed in disposing of cases.

We hold that on the particular facts of this case, the appeal is premature and is dismissed and that the case is remanded for disposition.

Lord v. Jeffreys

Appeal dismissed.

Judges MORRIS and VAUGHN concur.

C. REESE LORD v. GEORGE JEFFREYS, THELMA C. JEFFREYS, JAMES T. JEFFREYS, JR., GAY P. JEFFREYS, VIRGINIA C. JEFFREYS, MILDRED JACKSON, GEORGE E. McGRIFF, JR., LEROY DUKES, NATIONAL INVESTMENT PROPERTIES, INC., AND SOUTHERN REALTY OF ATHENS, INC.

No. 748SC350

(Filed 5 June 1974)

Lis Pendens— action for payment of money — notice of *lis pendens* inapplicable

Plaintiff was not entitled to the filing of a notice of *lis pendens* in his action for a personal judgment for the payment of money, and the court correctly struck the notice from the records. G.S. 1-116(a).

APPEAL by plaintiff from *James, Judge*, 12 November 1973 Session, Superior Court, WAYNE County. Heard in the Court of Appeals 19 April 1974.

This action was brought to recover \$250,000 commissions allegedly due plaintiff in the sale of real estate and \$1,500,000 damages for breach of contract. In his complaint plaintiff also asked that "a *lis pendens* be filed in this matter to protect the claim of the plaintiff." On 2 October 1973, a notice of *lis pendens* was filed in the office of the Clerk of the Superior Court of Onslow County. On 31 October 1973, defendants George Jeffreys and James T. Jeffreys filed a notice and motion that an order enter striking and cancelling from the records the notice of *lis pendens* filed by the plaintiff. From judgment entered allowing the motion and ordering the Clerk to strike from and cancel of record the notice of *lis pendens* by marginal reference to the order, the plaintiff appealed.

Roland C. Braswell and Thomas E. Strickland, by Roland C. Braswell, for plaintiff appellant.

Taylor, Allen, Warren and Kerr, by Lindsay C. Warren, Jr., for defendant appellees, George Jeffreys and James T. Jeffreys, Jr.

Lord v. Jeffreys

MORRIS, Judge.

Under the Rules of this Court an appellant is required to docket the record on appeal within 90 days after the date of the judgment. If this is not done, and no extension of time is obtained, the appeal is subject to dismissal. Rule 5 and Rule 48, Rules of Practice in the Court of Appeals of North Carolina. This record on appeal was not docketed within the time prescribed by the rules and is, therefore, subject to dismissal. We have, however, chosen to discuss the case on its merits.

In North Carolina, *lis pendens* is purely statutory. There can be no valid notice of *lis pendens* in this State except in one of the three types of action enumerated in subsection (a) of § 1-116 which subsection provides:

“(a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in the following cases:

- (1) Actions affecting title to real property;
- (2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and
- (3) Actions in which any order of attachment is issued and real property is attached.”

Cutter v. Realty Co., 265 N.C. 664, 144 S.E. 2d 882 (1965).

This complaint asks for commissions for the sale and purchase of the properties therein described and for damages for breach of contract. Appellant candidly concedes that there are no cases in this State allowing the filing of a notice of *lis pendens* in this situation. He contends, however, that we should adopt the rule that the broker is entitled to an equitable lien on the land for his commissions. In our opinion, the language of the statute is too clear to permit any construction other than that for plaintiff to have the right to file a notice of *lis pendens* in this action, it must be an action affecting the title to land.

In *Horney v. Price*, 189 N.C. 820, 823-824, 128 S.E. 321 (1925), plaintiff sued for commissions for the sale of land. He had filed a notice of *lis pendens*. The plaintiff in his complaint, prayed for “judgment for the sum of \$1,000.00 with interest thereon from 30 November 1922 . . .” The jury answered the issue in favor of plaintiff and in its judgment, the court noted that plaintiff has complied with the statute in filing notice of

Lord v. Jeffreys

lis pendens, adjudged the judgment to be a lien on the lands described in the notice of *lis pendens*, and ordered that execution issue. On appeal, the Court said:

"We think there was no error in the judgment allowing a recovery for the amount found by the jury to be due, but there was error in the judgment in holding that plaintiff had a valid *lis pendens* on the land and plaintiff's judgment was a lien on the land and execution could issue on the land. There is no statute in this State giving a lien to the plaintiff, an auctioneer or realtor on land he sells, and there is nothing in the contract giving a lien. We can find no authority to sustain plaintiff's contention that he has a lien—he cites none in his brief. Plaintiff, auctioneer, has no more lien on the land of the party he contracts with to sell land, unless it gives a lien, than a grocer who sells his groceries, a doctor or lawyer who renders professional services, or any person who brings an action to recover a money judgment."

The Court quoted the statute, noting that it was applicable only to actions affecting the title to land.

The principle set out in *Horney v. Price*, *supra*, was reiterated by the Court in *Cutter v. Realty Co.*, 265 N.C. 664, 668, 144 S.E. 2d 882 (1965), where Justice Lake, speaking for a unanimous Court said:

"Thus notice of *lis pendens* may not properly be filed except in an action, a purpose of which is to affect directly the title to the land in question or to do one of the other things mentioned in the statute. The *lis pendens* statute does not apply, for example, to an action the purpose of which is to secure a personal judgment for the payment of money even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant described in the complaint. (Citations omitted.)"

The action before us now is obviously one for a personal judgment for the payment of money. If plaintiff is successful and obtains a judgment and properly docket it, he will then obtain a lien upon the lands of defendants. However, he is not entitled to file a notice of *lis pendens*, and the court correctly struck it from the records.

Affirmed.

Judges CAMPBELL and VAUGHN concur.

State v. Vester

STATE OF NORTH CAROLINA v. JOHN BERNICE VESTER

No. 747SC375

(Filed 5 June 1974)

1. Criminal Law § 91; Indictment and Warrant § 13— motion for continuance — motion for bill of particulars — discretion of court

The trial court did not abuse its discretion in the denial of defendant's motions for a continuance and for a bill of particulars.

2. Burglary and Unlawful Breakings § 5— breaking or entering — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for felonious breaking or entering of a house where it tended to show that the owner returned home and discovered a person crouched beside a fence behind the house, that such person struck the owner with a flashlight, that later the same night the owner identified defendant as the person who struck him, that a child's bank which had been in the house and had contained \$10.00 was found at the spot where the owner first saw the intruder, and that a locked door inside the house had been kicked open, the absence of evidence of a breaking not being a fatal defect in such a prosecution.

APPEAL by defendant from *Webb, Judge*, October 1973 Criminal Session of Superior Court held in WILSON County.

Defendant was tried upon a bill of indictment charging him with felonious breaking and entering and larceny. He pleaded not guilty, was found guilty of breaking and entering, and, from judgment imposing prison sentence of not less than five nor more than seven years, he appealed.

Attorney General Robert Morgan, by Assistant Attorney General James E. Magner, Jr., for the State.

Farris, Thomas and Farris, by Robert A. Farris, for defendant appellant.

BRITT, Judge.

[1] First, defendant assigns as error the denial of his motions for a continuance of the trial and for a bill of particulars. It is clear that these motions were addressed to the discretion of the trial judge, and his rulings thereon will not be disturbed absent a showing of abuse of discretion. *State v. Coble*, 20 N.C. App. 575, 202 S.E. 2d 303 (1974); *State v. Robinson*, 15 N.C. App. 362, 190 S.E. 2d 270 (1972). We perceive no abuse of discretion in the ruling on either motion in the instant case. The assignment of error is overruled.

State v. Vester

[2] Defendant assigns as error the denial of his motion for nonsuit. The evidence favorable to the State is summarized in pertinent part as follows:

On 25 August 1973, Bobby Lee Moore and his family resided in a house located on the east side of U. S. 301 less than one-half mile north of Lucama, N. C. Around 10:00 p.m. on said date, Mr. Moore and his 15-year-old son returned home in an automobile. No other member of the family was at home at the time but the yard behind the house was well illuminated with floodlights. Near the back of the house was a brick fence about waist high on Mr. Moore. After alighting from the car, Mr. Moore walked into the backyard where he observed a person crouched down behind the brick fence. As Mr. Moore approached the person, he rose up and, while doing so, said twice, "I'm sorry, sir"; he then struck Mr. Moore on his head with a flashlight and ran away. The person who struck Mr. Moore was a white man, had a moustache, was wearing gloves and a gray and white striped cap like men who work on the railroad wear. Mr. Moore immediately notified police of the occurrence.

Soon thereafter, Mr. Moore went to the spot where he first saw the intruder and found a small "doggie" bank within arm's reach of the spot. The bank belonged to Mr. Moore's daughter; prior to that night it contained approximately \$10.00 and was located in the daughter's room in the house. An inspection of the house revealed that an inside door, leading from a bedroom to a bathroom and usually kept locked, had been kicked open. The hook on the door was broken, and part of the wood was splintered. Mr. Moore was not certain that all doors leading from the house to the outside were locked when the last member of the family left prior to Mr. Moore's return.

Some time later that night, Mr. Moore drove to Honeycutt's Truck Stop—approximately one mile from his home—and, on arrival there, saw defendant and identified him to police as the man he had seen at his home earlier that night. Defendant had not been given permission to enter the Moore home.

Considering the evidence in the light most favorable to the State, and giving the State the benefit of reasonable inferences fairly deducible therefrom, we hold that the evidence was sufficient to survive the motion of nonsuit. The offense for which defendant was charged and found guilty renders it unlawful to break into *or* enter a dwelling with intent to commit a felony

State v. Blackwelder

therein, and the absence of evidence of *breaking* does not constitute a fatal defect of proof. *State v. Brown*, 266 N.C. 55, 145 S.E. 2d 297 (1965). The assignment of error is overruled.

We have carefully considered the other assignments of error brought forward and argued in defendant's brief but find them to be without merit, and they, too, are overruled.

No error.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. WILLIAM KENT BLACKWELDER

No. 7418SC423

(Filed 5 June 1974)

Criminal Law § 86— past violations of narcotics laws — cross-examination of defendant proper

In a prosecution for possession and distribution of marijuana the trial court did not err in allowing the solicitor to cross-examine defendant thoroughly with respect to his involvement in violating the narcotic laws where the defendant admitted possession and distribution of marijuana on the occasion charged but contended that his actions resulted from the continued insistence of an undercover agent who proved to be a public officer.

APPEAL by defendant from *Lupton, Judge*, 22 October 1973 Criminal Session of Superior Court held in GUILFORD County, High Point Division.

Defendant was charged in separate bills of indictment with the felonious possession of marijuana with the intent to distribute, and the felonious distribution of marijuana, in violation of G.S. 90-95(a)(1). He entered pleas of not guilty to both charges, the jury returned verdicts of guilty as charged in both bills, and the court entered judgment imposing two one-year sentences in the custody of the Commissioner of Correction as a committed youthful offender, to run concurrently. Defendant appealed.

Attorney General Robert Morgan, by Assistant Attorney General William F. O'Connell, for the State.

Clarence C. Boyan for defendant.

State v. Blackwelder

BRITT, Judge.

Defendant's sole assignment of error is based upon his exception to the court's allowance of certain questions propounded to defendant on cross-examination. Defendant does not argue that a defendant in a criminal case who testifies in his own behalf may not be subjected to impeachment by questions related to specific acts of criminal, degrading or disparaging conduct; however, he argues that the questions in this case did not deal with *specific* acts. That portion of the cross-examination to which defendant excepted proceeded as follows:

"Q. How many times have you smoked marijuana?
OBJECTION. SUSTAINED as to the form of the question.

Q. How many times have you possessed marijuana before April 4, 1973, and one year prior to that time? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 9.

A. One year prior to that time?

Q. Other than what is marked State's Exhibit 1, had you ever before April 4, 1973, possessed marijuana? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 10.

A. Yes, sir.

Q. On how many occasions? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 11.

A. Are you talking about one year before?

The solicitor answered I am talking about any time. All my life? The solicitor answered, "Anywhere." I'd say at least on seventy-five occasions up till the summer of 1972.

Q. Had you ever smoked marijuana—before April 4, 1973? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 12.

A. Yes, sir.

Q. How many times? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 13.

State v. Blackwelder

A. Fifty times up until the summer of 1972.

Q. Over what period of time would you smoke these marijuana cigarettes? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 14.

A. I'd say over a period of two years.

Q. Have you ever possessed any other controlled substances other than marijuana prior to April 4, 1973? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 15.

A. Yes, sir.

Q. What types were they? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 16.

The witness asked, "This is in my whole life?"

Q. Anywhere in the world.

A. Speed. Amphetamines.

Q. What else? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 17.

A. LSD.

Q. What else?

The witness asked: "Do you want to know how many times?"

Q. LSD, that is Lysergic Acid Diethylamide, isn't it? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 18.

Q. What else?

A. Barbiturates. OBJECTION AND MOVE TO STRIKE. DEFENDANT MOVES FOR A MISTRIAL. OVERRULED AND MOTION DENIED.

DEFENDANT'S EXCEPTION No. 19.

Q. The barbiturates weren't prescribed by a doctor, were they? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 20.

A. I don't know if they were or not.

Q. They weren't prescribed for you, were they?

A. No. OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 21.

State v. Blackwelder

Q. What else? OBJECTION. OVERRULED.

DEFENDANT'S EXCEPTION No. 22.

Q. Have you consumed any amphetamines? OBJECTION. OBJECTION SUSTAINED.

Q. Have you possessed heroin? OBJECTION. OBJECTION SUSTAINED."

Chief Justice Bobbitt addressed himself to the problem of the scope of cross-examination of a defendant in a criminal trial in *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971), where he said:

"It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. *State v. Patterson*, 24 N.C. 346 (1842); *State v. Davidson*, 67 N.C. 119 (1872); *State v. Ross*, 275 N.C. 550, 553, 169 S.E. 2d 875, 878 (1969). Such questions relate to matters *within the knowledge of the witness*, not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith."

See also *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973), and *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972).

In the case at bar, defendant, who was shown to be an outstanding high school senior, admitted possession and distribution of the marijuana; he contended, however, that his actions resulted from the continued insistence of an undercover agent who proved to be a High Point police officer. Defendant testified that eventually he was persuaded to buy the marijuana from a third party and to resell it to the officer, merely as a favor to the officer. In view of those contentions, we think the trial court clearly was justified in permitting the district attorney to "sift the witness" in order to show the defendant's involvement in violating the narcotic laws. The questions asked defendant related to matters within his knowledge; and there is nothing to indicate that the questions were not asked in good faith. We hold that the trial court did not abuse its discretion.

State v. Walker

For the reasons stated, we find

No error.

Judges HEDRICK and CARSON concur.

STATE OF NORTH CAROLINA v. MAE WALKER

No. 7418SC439

(Filed 5 June 1974)

1. Homicide § 21— second degree murder — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for second degree murder where it tended to show that defendant and the victim had been arguing throughout the evening, that when the victim got into bed he put a loaded pistol on a chair at the head of the bed, and that the victim called defendant a "name" and defendant grabbed the pistol, cocked it and shot the victim in the head.

2. Homicide § 27— failure to instruct on involuntary manslaughter

The trial court in a homicide case did not err in failing to instruct the jury on involuntary manslaughter where the evidence showed an intentional firing of a pistol.

3. Homicide § 28— instruction on apparent necessity

The trial court in a homicide case sufficiently instructed the jury on apparent necessity.

APPEAL by defendant from *Exum*, Judge, 5 March 1973 Session of Superior Court held in GUILFORD County (High Point Division).

Defendant was charged in a bill of indictment, proper in form, with the murder of James Willie Leggett (Leggett). At the call of the case for trial, the District Attorney announced that the State would seek a verdict no greater than murder in the second-degree. Defendant pleaded not guilty. The jury returned a verdict of guilty of voluntary manslaughter and the court adjudged that defendant be imprisoned for a term of twelve years with credit to be given for time she spent in jail from 2 December 1972 until 7 February 1973. Defendant appealed, assigning errors.

Attorney General Robert Morgan, by Assistant Attorney General Raymond W. Dew, Jr., for the State.

Assistant Public Defender of the Eighteenth Judicial District Richard S. Towers for the defendant.

State v. Walker

BRITT, Judge.

[1] Defendant first assigns as error the denial of her motion for judgment as of nonsuit interposed at the close of all the evidence. The evidence, viewed in the light most favorable to the State as is required upon the motion, tended to show in pertinent part:

Defendant and Leggett, the victim, had lived together on Windley Street in High Point for two years. On 2 December 1972, Leggett arrived at his home about four p.m. and, after going back out for a half an hour and returning, began to drink intoxicants. Following the evening meal, defendant and Leggett decided to go out and, accompanied by Dianne Walker, they visited in the homes of two friends. During this time Leggett continued drinking and became intoxicated. Throughout the evening he fussed at defendant, cursed her, said that he should kill her, and that she knew he was "going to get" her. Thereafter, Leggett and defendant returned to their home, letting Dianne Walker out on the way. The fussing continued after they returned home, with defendant arguing back as they prepared for bed. Leggett got into bed, putting a loaded pistol which he had carried throughout the evening, on a chair at the head of the bed. Defendant left the bedroom and went into the kitchen. Upon her return to the bedroom, Leggett called defendant a "name" and started reaching for the pistol. Defendant grabbed the pistol, cocked it, and fired, the bullet hitting Leggett in his head. Leggett died at about five the next morning from brain damage due to the bullet wound.

We hold that the evidence was sufficient to overcome the motion for nonsuit.

[2] On her second assignment of error, defendant contends the court erred in failing to charge the jury that they could find defendant guilty of involuntary manslaughter. This assignment has no merit. The trial judge must instruct the jury on a lesser included offense when there is evidence to sustain such a verdict. *State v. Mays*, 14 N.C. App. 90, 187 S.E. 2d 479 (1972). In *State v. Wrenn*, 279 N.C. 676, 683, 185 S.E. 2d 129, 133 (1971), we find: "The crux of that crime [involuntary manslaughter] is whether an accused unintentionally killed his victim by a wanton, reckless, culpable use of a firearm or other deadly weapon. (Citations.)" The evidence in this case shows an intentional firing of the pistol; therefore, the trial judge was not required to charge on involuntary manslaughter.

Earle v. Wyrick

[3] On her third assignment of error, defendant submits that the court failed to charge that defendant could use as much force as was apparently necessary under the circumstances. In charging upon the elements of self-defense, the court stated that it would be necessary for defendant to satisfy the jury "... [t]hat the defendant in this case did not use excessive force, that is, more force than reasonably appeared to her to be necessary at the time. Again, it is for you the jury to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to her at the time." It is implicit in this statement that defendant could use that force apparently necessary. The assignment is overruled.

Defendant's fourth assignment of error, to the entry of judgment, is formal and dependent upon her other assignments. For reasons stated above this assignment is also overruled.

No error.

Judges HEDRICK and CARSON concur.

SAMUEL W. EARLE, ADMINISTRATOR OF THE ESTATE OF
JULIANNE EARLE, DECEASED v. LOUISE MARTIN WYRICK

No. 7418SC427

(Filed 5 June 1974)

1. Automobiles § 90— contributory negligence of pedestrian — walking on left — yielding to traffic — instructions proper

In a wrongful death action where the evidence tended to show that plaintiff's intestate was walking in the left lane when he was struck by a car approaching from the rear and in the right lane, the trial court did not err in charging, on the issue of plaintiff's intestate's contributory negligence, that it is unlawful for a pedestrian to walk along the traveled portion of any highway except the extreme left-hand side, and even when walking on the left side, a pedestrian must yield the right-of-way to approaching traffic.

2. Automobiles § 89— last clear chance — sufficiency of evidence to require submission to the jury

Where there was evidence in a wrongful death action that defendant should have perceived the danger of plaintiff's intestate if defendant had kept a proper lookout, but there was no evidence as to when defendant should have made this perception, the trial court did not err in refusing to submit to the jury the issue of last clear chance.

Earle v. Wyrick

APPEAL by plaintiff from *Crissman, Judge*, 22 October 1973 Civil Session of Superior Court held in GUILFORD County (Greensboro Division).

Plaintiff instituted this action to recover damage for the wrongful death of his intestate. Issues of negligence and contributory negligence were submitted to the jury and answered in the affirmative. From judgment in favor of defendant, plaintiff appealed.

Schoch, Schoch, Schoch and Schoch, by Arch K. Schoch, and John T. Manning, for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill, by Welch Jordan and Karl N. Hill, Jr., for defendant appellee.

BRITT, Judge.

[1] Plaintiff first assigns as error that portion of the jury instructions wherein the court charged, on the issue of plaintiff's intestate's contributory negligence, that it is unlawful for a pedestrian to walk along the traveled portion of any highway except the extreme left-hand side, and even when walking on the left side, a pedestrian must yield the right-of-way to approaching traffic. Plaintiff contends that the evidence in this case tended to show that his intestate was walking in the left lane and was struck by a car approaching from the rear and in the right lane; that intestate had no duty to yield the right-of-way to a car not approaching from the front, thus the jury was misled.

In *State v. Harrington*, 260 N.C. 663, 133 S.E. 2d 452 (1963), a manslaughter case, the facts were similar to those herein that defendant struck the victims in the left lane after approaching from behind them. Defendant requested the trial court to instruct the jury that "[i]t is the duty of a pedestrian walking along the left hand side of a highway to yield the right of way not only to traffic that approaches such pedestrian from the front but also to yield the right of way to traffic that approaches such pedestrian from the rear." The trial court denied the request. The Supreme Court ruled that while contributory negligence is no defense in a criminal action, in a case in which defendant is charged with manslaughter by reason of his alleged culpable negligence, the negligence of the person fatally injured is relevant and material on the question of proximate cause, and

Earle v. Wyrick

the trial court erred in denying the instruction. In the light of that decision, we hold that the instruction challenged here was correct.

Plaintiff also contends on this assignment that the court failed to instruct on the duty of a motorist to drive in the right half of the highway and that this bore on the question of intestate's contributory negligence. In view of our holding that intestate could have been contributorily negligent by failing to yield the right-of-way to a vehicle approaching from the rear, this contention can relate only to the question of defendant's negligence. Plaintiff can, therefore, show no prejudice since the jury found that defendant was negligent. This assignment is overruled.

[2] Plaintiff's second assignment presents the question of whether the court erred in refusing to submit to the jury the issue of last clear chance. We hold that it did not. The evidence was to the effect that: Plaintiff's intestate and a companion were walking on a street in a residential section. They were walking in the left lane, 2 or 3 feet from the center line, in such a manner as to face oncoming traffic. A car approached from the front and put its lights on high beam at about 100 to 125 feet away. The companion ran to the curb of the left lane and on reaching said curb, she heard a thump and turned to see intestate sliding along the pavement in front of defendant's car which had approached from the rear. The area was partially lighted by streetlights and lights of nearby homes; and, defendant saw intestate for less than a second before the collision.

There is evidence to show that defendant should have perceived the danger of plaintiff's intestate if defendant had kept a proper lookout, but there is no evidence as to when defendant should have made this perception. It is necessary for the submission of the issue that there be some evidence that defendant had a *clear* chance to avoid the injury. *Wise v. Tarte*, 263 N.C. 237, 139 S.E. 2d 195 (1964). This assignment is likewise overruled.

No error.

Chief Judge BROCK and Judge CAMPBELL concur.

State v. Holton

STATE OF NORTH CAROLINA v. FRED McCOTTER HOLTON

No. 743SC275

(Filed 5 June 1974)

1. **Automobiles § 126; Criminal Law § 64— drunken driving — coordination tests — advising of right to refuse — qualifications of administering officer**

An officer's testimony as to the results of physical performance tests given at the police station to a defendant charged with drunken driving was not rendered inadmissible by the fact defendant was not advised that he had a right to refuse the tests or by the fact that no foundation was laid as to the qualifications of the officer to administer the coordination tests.

2. **Automobiles § 126; Criminal Law § 88— drunken driving — question about "beer joint"**

In a prosecution for drunken driving, defendant was not prejudiced when the solicitor asked him on cross-examination whether the Oasis Club, to which defendant had been prior to his arrest, was a "beer joint."

APPEAL from *Cowper, Judge*, 5 November 1973 Session of CRAVEN County Superior Court. Argued in the Court of Appeals 9 April 1974.

The defendant was convicted in District Court of driving while under the influence of intoxicants. He appealed to Superior Court where a trial de novo was held. From a verdict of guilty and an active sentence pronounced thereon, the defendant appealed to this court.

Officer W. R. Mumford, Jr., testified that he saw the defendant operating his motor vehicle on a public road in New Bern at about 4:10 a.m. on 23 August 1973. The automobile was moving erratically and weaving across the road. The officer stopped the vehicle and observed the defendant. He testified that the defendant's speech was slurred, that he had an odor of alcohol about him, that he had difficulty producing his license and that he had difficulty getting out of the car. The officer formed the opinion that the defendant was under the influence of intoxicating beverages and placed him under arrest. He was advised of his constitutional rights and taken to the police station where a breathalyzer test was administered. Other coordination tests were given to the defendant at the police station and he performed them in an unsatisfactory fashion. The breathalyzer test showed the defendant's blood alcohol level to be .17

State v. Holton

percent. The defendant told the arresting officer that he had been drinking beer at the Oasis Club and had consumed a total of five beers.

Attorney General Robert Morgan by Associate Attorney William A. Raney, Jr., for the State.

Charles K. McCotter, Jr., for the defendant.

CARSON, Judge.

[1] The defendant contends that the trial court committed error in allowing the arresting officer to testify as to the results of the physical performance tests given to the defendant at the police station. Defendant says he was not advised of his right to refuse the tests and the officer should not have been allowed to administer the tests because no foundation was laid as to the qualifications of the patrolman to administer the coordination tests. The defendant contends that since these requirements must be satisfied before the breathalyzer can be given, they must also be satisfied before any performance tests can be given. These contentions are without merit. The privilege against incrimination relates only to testimonial or communicative acts and does not apply to tests such as balance tests. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908; *State v. Strickland*, 5 N.C. App. 338, 168 S.E. 2d 697 (1969), rev'd on other grounds, 276 N.C. 253, 173 S.E. 2d 129 (1970). The administering of the breathalyzer requires certain skills not possessed by the general public, *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973); *State v. Powell*, 10 N.C. App. 726, 179 S.E. 2d 785 (1971); while the administration of the balance tests can be done by anyone.

[2] On cross-examination of the defendant the solicitor asked him the following question, "The Oasis Club is a beer joint, isn't it?" The defendant contends that this question is extremely prejudicial. He alleges that it implies that a person who goes to the club goes there to drink beer and nothing else, and that the use of the word "joint" carries a connotation of unwholesomeness and immorality. He contends that these two implications together were designed to and did picture the defendant as "an immoral degenerate who was drinking beer." This contention is also without merit. Wide latitude is provided to the defense counsel and to the solicitor on cross-examination. *State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875 (1969); *State v. Diaz*, 14 N.C. App. 730, 189 S.E. 2d 570 (1972). Clearly, the trial

State v. Burnette

court did not abuse its discretion in allowing this question to be asked the defendant.

Other assignments of error presented by the defendant have been considered carefully. We hold that they, also, lack merit and that the defendant received a fair and impartial trial.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. GARY BURNETTE

No. 7428SC279

(Filed 5 June 1974)

Receiving Stolen Goods § 5— absence of evidence someone else stole property

Evidence that class rings were stolen from the trunk of a car in August 1972 and that defendant gave the stolen rings to another to sell in November 1972 was insufficient to be submitted to the jury on the issue of defendant's guilt of receiving stolen goods in violation of G.S. 14-71 since there was no evidence that someone other than defendant stole the rings or that defendant received the rings from another.

APPEAL from *Gambill, Judge*, 1 October 1973 Session of BUNCOMBE County Superior Court. Argued in the Court of Appeals 20 March 1974.

The defendant was charged in a bill of indictment with the felony of receiving stolen goods, knowing that said goods were stolen. A plea of not guilty was entered. From a verdict of guilty as charged and an active sentence imposed thereon, the defendant gave notice of appeal.

The State's evidence showed that George Goosmann was a manufacturer's representative engaged in the business of selling high school and college rings. On 20 August 1972, Goosmann had in his possession approximately four hundred samples of high school and college class rings. He placed these items in the trunk of his car, which was protected by a burglar alarm system. The following morning he observed that the burglar system had been cut. Upon opening the trunk of his car, he discovered that the rings and other items of personal property had been stolen.

State v. Burnette

Steve Crane testified that on 26 November 1972, the defendant came to his house. He brought some rings with him and asked Crane if he could sell them. The defendant offered to sell the rings to Crane for two to three dollars apiece and let Crane sell them for whatever he could get for them, keeping the profit for himself. Crane sold twenty-two rings to various individuals for forty-two dollars and gave the money to the defendant. The defendant filled the ring case again for Crane and left. Crane had asked the defendant if the rings were "hot." The defendant did not answer. The ring case and rings given by defendant to Steve Crane were introduced into evidence and identified by Goosmann as part of those stolen from the trunk of his car in August. The fair market value of the rings was established to be between thirty-five and forty dollars apiece.

At the end of the State's evidence, the defendant moved for a judgment of nonsuit. This motion was denied. The defendant rested and renewed his motion, which was again denied.

Attorney General Robert Morgan by Assistant Attorney General George W. Boylan for the State.

S. Thomas Walton for the defendant.

CARSON, Judge.

The defendant was charged with the offense of receiving stolen goods in violation of G.S. 14-71. The elements of this offense are that the goods are stolen by someone other than the defendant, that the defendant receives the goods knowing them to have been stolen, and that he continues such possession with a dishonest purpose. *State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971); *State v. Grant*, 17 N.C. App. 15, 193 S.E. 2d 308 (1972). Considering all the evidence in the light most favorable to the State, the defendant could be shown to have possessed the stolen rings on 26 November 1972, knowing that the rings were stolen, and possessing them for a dishonest purpose. There is, however, no evidence tending to show that someone other than the defendant stole the rings or that the defendant received the rings from another. The burden of proof of these elements is the same as the elements of any other offense.

While the General Assembly might provide that the possession or offering for sale of goods, known to have been stolen, be declared a crime, it has not done so. G.S. 14-71 applies only to receiving the stolen goods. Absent any evidence of receiving,

Quadrant Corp. v. City of Kinston

which presupposes the theft by another, we hold that the judgment of nonsuit should have been granted. Whether the possession of the stolen items under the circumstances outlined would be sufficient to sustain a larceny charge is not before us. We do note, however, that receiving is not a lesser included offense of larceny; and jeopardy has not attached as to a proper larceny indictment. *State v. Neill*, 244 N.C. 252, 93 S.E. 2d 155 (1956); *State v. Brady*, 237 N.C. 675, 75 S.E. 2d 791 (1953); *State v. Cassada*, 6 N.C. App. 629, 170 S.E. 2d 575 (1969).

The judgment is reversed.

Judge BRITT and Judge HEDRICK concur.

THE QUADRANT CORPORATION v. CITY OF KINSTON, A MUNICIPAL CORPORATION, AND C. ROSS HILL, BUILDING INSPECTOR OF THE CITY OF KINSTON

No. 748SC215

(Filed 5 June 1974)

1. Municipal Corporations § 30— building permit — discretion of building inspector

A building inspector had no discretion to withhold a building permit for the construction of apartments where the applicable zoning restrictions permitted the construction of multiple dwellings on the applicant's property and the plans and specifications for the proposed structures showed that the apartments complied with lot size and other space requirements embodied in the zoning laws.

2. Municipal Corporations § 30— decision of board of adjustment — finality

Decision by the board of adjustment that plaintiffs are entitled to a building permit is final where no aggrieved party sought review of the decision in the superior court. G.S. 160A-388 (e).

APPEAL by defendants from *Cowper, Judge*, 13 August 1973 Session of Superior Court held in LENOIR County.

Plaintiff brought this action for mandamus to compel defendants to issue a building permit.

On 23 March 1973, plaintiff applied to C. Ross Hill, Building Inspector for the City of Kinston, for a building permit to construct apartments. The construction site was zoned RA-6 (Residential), a classification which includes multiple dwellings

Quadrant Corp. v. City of Kinston

as a permitted use provided minimum lot size and other space requirements are satisfied. Plaintiff submitted scale drawings of the property and proposed buildings which depict the proposed placement of the structures. Hill refused to issue a permit and informed plaintiff that the matter should be referred to the Kinston Board of Adjustment for review. On 2 April 1973, plaintiff applied to the Board of Adjustment for a building permit. The Board determined that plaintiff's request for a permit should be granted. Defendant appellant did not petition the superior court to review that decision. Hill still refused to issue the permit. He told plaintiff that the Kinston Board of Aldermen would have to review the matter. On two occasions, the Aldermen declined to authorize the issuance of a permit.

Plaintiff then brought this action for mandamus. After making findings of fact and conclusions of law, the court directed defendants to issue the building permit upon plaintiff's request and payment of the required fees.

Barden, Stith, McCotter & Stith by Laurence A. Stith for plaintiff appellee.

Vernon H. Rochelle for defendant appellants.

VAUGHN, Judge.

[1] Defendants except to the entry of the judgment and argue, in effect, that the judgment is based on erroneous conclusions of law. With respect to defendant Hill, the court determined that "the Building Inspector should have issued such permit forthwith upon the application made to him. . . ." This conclusion is supported by the facts found and admitted. *Manufacturing Co. v. Clayton, Acting Comr. of Revenue*, 265 N.C. 165, 143 S.E. 2d 113; *Insurance Co. v. Motors*, 264 N.C. 444, 142 S.E. 2d 13. The court found and defendants admitted that applicable zoning restrictions permitted the construction of multiple dwellings on plaintiff's property. The court further found and defendants also admitted the plans and specifications for the proposed structures indicated that the apartments complied with the lot size and other space requirements embodied in the zoning laws. From these findings, it follows that as a matter of law, Hill had no discretion to withhold the requested building permit. See *In re Application of Construction Co.*, 272 N.C. 715, 158 S.E. 2d 887; *Mitchell v. Barfield*, 232 N.C. 325, 59 S.E. 2d 810.

[2] So far as the Board of Adjustment of the City of Kinston is concerned, the court concluded that the Board determined plain-

Quadrant Corp. v. City of Kinston

tiff was entitled to a permit, that no aggrieved party appealed the decision, and that that decision is final. We note that again the court's conclusions of law are supported by facts found and admitted. *Manufacturing Co. v. Clayton, Acting Comr. of Revenue, supra*; *Insurance Co. v. Motors, supra*. Numerous decisions support the legal proposition that ordinarily Board of Adjustment decisions are final. *E.g., Yancey v. Heafner*, 268 N.C. 263, 150 S.E. 2d 440; *Durham County v. Addison*, 262 N.C. 280, 136 S.E. 2d 600.

In addition to concluding that the Board's decision was final, the court also concluded that "the Board of Adjustment did have before it [when it made its decision] all pertinent facts and circumstances and that it did make a full and impartial inquiry into all matters and things which it should have considered. . . ." Although this conclusion was apparently designed to answer defendants' argument that the Board considered insufficient evidence and failed to comply with the terms of its statutory charter, it is extraneous to plaintiff's right to mandamus. Defendants were not in a position, within the context of this action, to challenge the validity and propriety of the Board's decision. G.S. 160A-388(e) provides that all decisions of a board of adjustment are subject to review by the superior court by proceedings in the nature of certiorari. The Code of the City of Kinston includes the following.

"Sec. 24-41. Appeals from decision of board.

Any person or persons, jointly or severally, aggrieved by any decision of the board, or any taxpayer, or any officer, department, board, or bureau of the city may, within thirty (30) days after the filing of the decision in the office of the board, but not thereafter, present to a court of competent jurisdiction a petition duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of illegality, whereupon such decision of said board shall be subject to review as provided by law. (Ord. of 5-1-50, § 12)"

Defendants have complied with neither G.S. 160A-338 nor Section 24-41. The judgment from which defendants appealed is affirmed.

Affirmed.

Judges CAMPBELL and MORRIS concur.

State v. Boykins

STATE OF NORTH CAROLINA v. AMOS STANLEY BOYKINS

No. 747SC126

(Filed 5 June 1974)

Larceny § 7— larceny of tractor — sufficiency of evidence

Evidence in a felonious larceny case was sufficient to be submitted to the jury where it tended to show that a tractor and equipment were stolen from one Thompson, defendant brought a tractor and equipment to the farm which he was sharecropping at about the same time, defendant sold the tractor to the owner of the farm when he left the next year, defendant then informed Thompson as to the whereabouts of the tractor and asked \$200 for the information, Thompson went to the farm and discovered the tractor which defendant had left there, and the serial number matched that of the tractor stolen from Thompson.

APPEAL by defendant from *James, Judge*, 18 June 1973 Session of Superior Court held in NASH County. Argued in the Court of Appeals 9 April 1974.

Defendant was charged in a bill of indictment with the felonious larceny of a Farmall 140 tractor and equipment.

The jury found defendant guilty as charged.

Attorney General Morgan, by Associate Attorney Hassell, for the State.

Spruill, Trotter & Lane, by John R. Jolly, Jr., for the defendant.

BROCK, Chief Judge.

Defendant assigns as error that the trial court denied defendant's motion for compulsory nonsuit. The sole question raised by this assignment of error is whether there is substantial evidence of all material elements of the offense charged. In considering the motion for nonsuit, all of the evidence must be viewed in the light most favorable to the State. When so viewed, the evidence tends to show the following:

On 29 May 1970, Mr. Edward Thompson (Thompson) owned a Farmall 140 tractor and equipment. The tractor and equipment were located on a small farm owned by Thompson in Nash County, about a mile from where Thompson lived in Wilson County. After using the tractor on 29 May 1970, Thompson parked it under a shelter for the night. About 3:00 a.m. of

State v. Boykins

30 May 1970, Mr. Eugene Patterson (Patterson) was driving past Thompson's farm and observed a 1959 Chevrolet truck, color white over turquoise over white, with its rear wheels in the roadside ditch and front wheels on the edge of the pavement. Patterson saw two men and a tractor on the bed of the truck. When Thompson went to his shelter on the morning of 30 May 1970, the Farmall 140 tractor and equipment were missing. Thompson did not give anyone permission to move his tractor and equipment. The tractor and equipment were of a value of \$1200.00.

Thompson immediately notified Deputy Pridgen who conducted an investigation at the site. The deputy found tire tracks in the roadside ditch and impressions of a bumper against the ditch bank. The deputy found tractor tracks where it had "gone up on the truck," an oak board about 2x8x10, and a pine board "lying there." He also found a piece of angle iron which he later determined to be similar to a piece of angle iron missing from the rear of a 1959 Chevrolet truck, color white over turquoise over white, which had been abandoned by defendant.

In May 1970, defendant was sharecropping with Mr. Wiley Bullock (Bullock) about five miles east of Battleboro. While sharecropping with Bullock, defendant owned a 1959 Chevrolet truck, color white over turquoise over white. Defendant borrowed \$700.00 from Bullock for the purpose of buying a tractor and equipment. Defendant brought a Farmall 140 tractor to Bullock's farm the last of May or first of June 1970. Defendant used the tractor on Bullock's farm during the rest of 1970 and part of 1971. In March or April of 1971, defendant stopped farming with Bullock and went into the construction trade. Defendant sold the Farmall 140 tractor to Bullock for \$900.00.

In August 1972, defendant, who was unknown to Thompson, went to Thompson's home and advised Thompson that he knew where Thompson's tractor was located. Defendant asked \$200.00 for the information. Thompson and Deputy Pridgen went to Bullock's farm and inspected the Farmall 140 tractor in Bullock's possession. The serial number on the Farmall 140 tractor was the same as the serial number of the Farmall 140 tractor taken from Thompson's shed in 1970. Deputy Pridgen inspected a 1959 Chevrolet truck, color white over turquoise over white which defendant had abandoned when he left Bullock's farm in March or April of 1971. The serial number on the truck body was the same as the serial number of a truck registered in

State v. Armstrong

defendant's name. The piece of angle iron found by Deputy Pridgen at the scene in 1970 was similar to a piece of angle iron missing from the back of defendant's abandoned truck.

In our opinion, the evidence required submission of the case to the jury, and the evidence supports the verdict of guilty.

No error.

Judges PARKER and BAILEY concur.

STATE OF NORTH CAROLINA v. SIDNEY ARMSTRONG

No. 7419SC288

(Filed 5 June 1974)

1. Narcotics § 4.5— entrapment — sufficiency of instructions

In a prosecution for distribution of marijuana the trial court's instruction on entrapment was proper.

2. Narcotics § 4— distribution of marijuana — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for distribution of marijuana where it tended to show that an SBI agent talked with defendant and several others about where he could purchase drugs, defendant told the agent he could take him to a place where the agent could purchase drugs, the agent and defendant went to a given address, defendant entered the residence with the agent's money, and defendant returned with marijuana.

APPEAL by defendant from *Seay, Special Judge*, at the 17 September 1973 Criminal Session of ROWAN Superior Court.

Heard in the Court of Appeals 6 May 1974.

The defendant was indicted and convicted of distribution of marijuana in violation of G.S. 90-95 (a) (1) and G.S. 90-95 (b). The State's evidence tended to show that Robert H. Clark, Jr., was an undercover agent for the State Bureau of Investigation on 26 February 1973. On that date Mr. Clark was in the Friendly Cue Pool Room in Salisbury, North Carolina, and talked with the defendant and several other people about where he could purchase drugs. The defendant told Clark that he could take Clark to a place where he could get some drugs. The defendant, two other males and Mr. Clark left in Clark's car and drove to a place on Locke Street where the defendant told Clark to stop.

State v. Armstrong

The defendant told Clark to give him the money and that he would go and get the marijuana. Clark said he wanted ten dollars' worth and gave the defendant the money. The defendant and one other man left the car and returned a few minutes later with two envelopes containing marijuana. The defendant emptied most of the contents of one envelope into the other which he gave to Mr. Clark. The defendant retained the envelope containing the smaller amount of marijuana. From a verdict of guilty and a sentence of eighteen months in the custody of the Commissioner of Corrections as a committed youthful offender, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General William F. O'Connell and Assistant Attorney General Ann Reed for the State.

J. H. Rennick for defendant appellant.

CAMPBELL, Judge.

The defendant contends that it was error for the trial court not to grant his motion for judgment as of nonsuit in that the evidence established that the defendant was entrapped. The defendant also assigns as error the instruction by the trial court that a sale and physical transfer of the marijuana would be a "distribution" and the instruction that to be convicted of distribution the defendant had to know that the substance was marijuana. Defendant's contention is that the judge's instruction carried the implication that in any circumstances, including entrapment, if defendant knew that the substance was marijuana, and if a transfer actually took place, then the defendant should be found guilty.

[1, 2] The charge of the trial court must be read contextually. It is evident that the trial court, in a very articulate and understandable fashion, instructed the jury on all aspects of the case, including a detailed instruction on entrapment and a review of the evidence of both sides relating to entrapment. The fact finders could not have been under any misapprehension as to the applicability of the defense of entrapment by the charge of the trial court. In *State v. Fletcher* and *State v. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971), the court stated:

"The North Carolina cases on entrapment are accurately summarized in 2 Strong's N. C. Index 2d, Criminal Law, § 7, as follows:

State v. Brown

‘Mere initiation, instigation, invitation, or exposure to temptation by enforcement officers is not sufficient to establish the defense of entrapment, it being necessary that the defendants would not have committed the offense except for misrepresentation, trickery, persuasion, or fraud. . . . [I]f the officer or agent does nothing more than afford to the person charged an opportunity to commit the offense such is not entrapment. Therefore, mere acts affording defendant an opportunity to commit the offense and steps taken to apprehend him in its commission, or even the fact that officers pretended to act in conjunction with the defendant in committing an offense, does not constitute entrapment when the idea of committing the offense originates with the defendant or defendants.’ ”

On the issue of nonsuit, the evidence for the State was as set out above. When viewed in the light most favorable to the State, the evidence is sufficient to withstand a motion for judgment as of nonsuit. We find no error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JERRY BROWN AND ROGER DALE
BIRCHFIELD

No. 7430SC345

(Filed 5 June 1974)

Criminal Law § 118— equal stress to contentions

In this common law robbery case, the trial court did not fail to give equal stress to the contentions of defendants as compared to those of the State.

APPEAL by defendants from *Thornburg, Judge*, October 1973 Session of Superior Court held in CHEROKEE County.

This is a criminal action wherein the defendants, Jerry Brown and Roger Dale Birchfield, were charged in separate bills of indictment, proper in form, with common law robbery. The defendants entered pleas of not guilty to the charges. The

State v. Brown

evidence introduced by the State tended to establish the following:

On 4 September 1973, Wade Anderson (the victim) traveled to Murphy, North Carolina, to attend a cattle sale and remained there until late in the afternoon. Having missed his bus home, Mr. Anderson asked the defendants (and one other person not a party to this action) to give him a ride home; and they said they would. While riding, Mr. Anderson asked the boys if they had any liquor; and they offered him a drink from their bottle. On handing the bottle back to the boys, Anderson noticed a lug wrench in the hand of defendant Brown. Shortly thereafter, defendant Brown hit Anderson with the lug wrench on his hands and on his head; and the defendants removed a wrist watch, knife, cigarette lighter, and two hundred and twenty-five dollars in cash from Anderson's person.

The defendants offered evidence tending to show that on the evening in question the alleged victim was "very drunk" and asked them to drive him to a bootlegger's house so that he could purchase a pint of liquor. After complying with Anderson's request, the defendants then proceeded in the general direction of Anderson's house; however, prior to arriving at Anderson's house, the victim notified them that he wished to get out. Mr. Anderson indicated that his brother lived near the spot where he wished to get out; and the defendants' evidence revealed that Anderson, because of his intoxicated condition, had a difficult time in getting out of the car. The defendants then drove down the highway for a short distance, turned around at a median crossover strip, and on the way back to town passed by the place where Anderson had been let out. Defendant Birchfield and another occupant of the car both observed that another car had stopped at approximately the same place where they had previously stopped.

The mother of defendant Brown testified that two days after the alleged robbery that she showed a picture of her son to Anderson, and that the latter could not say that the picture depicted the same person who robbed him. She said that Anderson told her that the only way he knew who robbed him was because Mr. Hall, a gas station attendant, had observed Anderson with the boys on the evening of 4 September 1973, and had told Anderson this at a later time.

From a verdict of guilty and judgments that defendant Brown be imprisoned for not less than six (6) nor more than

Howell v. Haliburton

eight (8) years and that defendant Birchfield be imprisoned for a term of not less than five (5) nor more than seven (7) years, the defendants appealed.

Attorney General Robert Morgan by Deputy Attorney General R. Bruce White, Jr., for the State.

McKeever, Edwards, Davis & Hays by Herman Edwards for defendant appellants.

HEDRICK, Judge.

Defendants, by their first assignment of error, contend that the court failed to give equal stress to the contentions of the defendants as compared to those of the State. A careful review of the charge leads us to the conclusion that there is no merit in this assignment of error. *State v. Adams*, 245 N.C. 344, 95 S.E. 2d 902 (1956).

Defendants also request that we review the record to determine whether error appears upon the face thereof. Accordingly, we have examined the face of the record and find that the defendants were charged in proper bills of indictment, the verdicts were proper, and the sentences were within the limits prescribed by statute.

The defendants were afforded a fair trial, free from prejudicial error.

No error.

Judges BRITT and CARSON concur.

JUANITA HOWELL, BY HER GUARDIAN AD LITEM, THOMAS L. HOWELL, AND THOMAS L. HOWELL, INDIVIDUALLY v. JOHN HALIBURTON, d/b/a BEBBER'S GROCERY, JOHN HALIBURTON, INDIVIDUALLY, AND THE PEPSI-COLA BOTTLING COMPANY OF WINSTON-SALEM, INC.

No. 7422SC175

(Filed 5 June 1974)

1. Rules of Civil Procedure § 55— setting aside entry of default — discretion of court

Whether good cause exists to set aside an entry of default pursuant to Rule 55(d) is a matter addressed to the sound discretion of

Howell v. Haliburton

the trial court, and its ruling will not be disturbed unless a clear abuse of discretion is shown.

2. Judgments § 24; Rules of Civil Procedure § 55— entry of default — delivery of suit papers to insurer — failure to check on case

The trial court did not err in refusing to set aside an entry of default against defendant bottling company where the court found that defendant transmitted the complaint and summons to its products liability insurer on the day of service, the insurer took no action to answer or otherwise defend the lawsuit, and defendant paid no further attention to the lawsuit until learning of the entry of default some eight months later.

APPEAL by defendant, Pepsi-Cola Bottling Company of Winston-Salem, Inc., from order of *Collier, Judge*, 13 September 1973 Session of Superior Court held in ALEXANDER County.

Civil action for damages resulting from alleged breach of warranty and negligence. By complaint filed 24 August 1972, plaintiffs alleged their damages were caused when a bottle of Pepsi-Cola, purchased at Bebbber's Grocery and bottled by Pepsi-Cola Bottling Company of Winston-Salem, Inc. (Bottling Co.), exploded on 12 April 1970, injuring the minor plaintiff's eye. Defendant Haliburton, individually and d/b/a Bebbber's Grocery, filed answer in apt time and is not a party to this appeal. Summons and complaint were served on defendant Bottling Co. on 28 August 1972, but said defendant failed to answer or otherwise plead. Such service and its failure to plead being made to appear by affidavit, on 16 November 1972 the clerk of superior court entered default against defendant Bottling Co. On 16 July 1973 defendant Bottling Co. filed motion pursuant to Rule 55(d) to set aside the entry of default and to be allowed to file answer. On 20 September 1973 the trial court, having considered the pleadings, affidavits, and arguments of counsel, found that defendant Bottling Co. had not shown good cause for setting aside the entry of default and denied the motion "in the discretion of the court." Defendant Bottling Co. appealed.

Chambers, Stein, Ferguson & Lanning by Fred A. Hicks for plaintiff appellees.

Mraz, Aycock, Casstevens & Davis by Frank B. Aycock for defendant appellant.

PARKER, Judge.

[1] Whether good cause exists to set aside an entry of default pursuant to Rule 55(d) is a matter addressed to the sound discretion of the trial court, *Acceptance Corp. v. Samuels*, 11 N.C.

Howell v. Haliburton

App. 504, 181 S.E. 2d 794, and its ruling will not be disturbed unless a clear abuse of discretion is shown, *Hubbard v. Lumley*, 17 N.C. App. 649, 195 S.E. 2d 330. On the facts of this case, no abuse of discretion has been shown.

[2] The affidavits presented by defendant Bottling Co. in support of its motion indicated that plaintiffs' summons and complaint were served upon Donald L. McCollum, appellants' assistant secretary-treasurer, on 28 August 1972. That same day, McCollum, in accordance with the claim reporting procedure of appellant's products liability insurer, Appalachian Insurance Company, reported plaintiffs' claim to Appalachian by a long distance phone call and mailed the summons and complaint to Appalachian. After 28 August 1972, neither McCollum nor any other officer or employee of defendant Bottling Co. had anything further to do with the matter until receipt of a letter, dated 3 May 1973, from plaintiffs' counsel advising of the 16 November 1972 entry of default. After 28 August 1972, Appalachian took no affirmative action to answer or otherwise defend in the case until, after being advised on 7 May 1973 of the entry of default, it contacted local counsel on 28 or 29 June 1973 to attend to the matter.

These facts, which were substantially reflected in the trial court's findings of fact, do not compel a conclusion that appellant demonstrated good cause to have the entry of default set aside. Defendant Bottling Co., after transmitting plaintiffs' complaint and summons to Appalachian on the day of service, paid no further attention to the lawsuit until more than eight months later. Such continued inattention distinguishes the instant case from the situations presented in *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735, and in *Hubbard v. Lumley*, *supra*. When the trial court exercises its discretion in considering a motion to set aside an entry of default, it is entirely proper for the court to give consideration to the fact that default judgments are not favored in the law. At the same time, however, it is also true that rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity.

No abuse of the trial court's discretion being here shown, the order appealed from is

Affirmed.

Judges VAUGHN and CARSON concur.

Long v. Eddleman

LUCY LONG v. J. FRANK EDDLEMAN

No. 7419DC451

(Filed 5 June 1974)

Estates § 9; Tenants in Common § 1— personal property — husband and wife — money advanced by wife — no tenancy in common

In an action to recover one-half the proceeds received by defendant, plaintiff's former husband, from the sale of cattle, a tractor and two trailers following separation of the parties, plaintiff's evidence was insufficient to establish that such personal property was owned by plaintiff and defendant as tenants in common where it showed at most that she advanced funds to defendant which he used to purchase the property, it being presumed that there was a loan if the husband received and used his wife's money.

APPEAL by defendant from *Warren, Judge*, 20 November 1973 Session of District Court held in CABARRUS County.

Prior to the institution of this action, the parties had been married to each other, but were divorced. Plaintiff brought the action to recover \$3,100, representing one-half of the proceeds received from the sale of personal property by defendant, following the separation of the parties. Plaintiff alleged that the property was held as tenants in common. From judgment entered upon a jury verdict in favor of plaintiff, defendant appealed.

Davis, Koontz & Horton, by K. Michael Koontz, for plaintiff appellee.

Thomas K. Spence for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the court to grant his motion for judgment notwithstanding the verdict, and certain portions of the court's charge to the jury. We find it necessary to consider the first assignment only.

On a motion for judgment notwithstanding the verdict, the sufficiency of the evidence is drawn into question and the court must view the evidence in the light most favorable to the non-movant. *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972). The evidence in this case, viewed in the light most favorable to plaintiff, shows:

Plaintiff and defendant were husband and wife for seventeen years. On 18 October 1971, they separated from each other

Long v. Eddleman

and thereafter were divorced. Following the separation, defendant sold four cows, three calves, a breeding bull, a 1968 Massey-Ferguson tractor, a trailer for hauling a tractor, and a trailer for hauling cattle. While they were married and living together they had two joint checking accounts to which both made contributions. The property in question was paid for, in part, from monies from the joint accounts. Plaintiff "gave" defendant money for parts and materials for the trailers, for payments on the tractor, and for the cattle. She did not sign any note in connection with the purchase of the tractor, and any obligations on any notes so connected were defendant's. She did not participate in the actual buying of any of the cattle nor did she sign any notes or checks for the cattle. Defendant sold the tractor and trailers for \$4,400; he sold the cattle, the value of which was \$1,700. Plaintiff has received no money from the sale of this property.

Plaintiff's theory is that the property was owned by plaintiff and defendant as tenants in common. Generally, a tenancy in common in personal property is created in one of two ways: (1) there is concurrent ownership under circumstances which do not either expressly or by necessary implication call for some other form of cotenancy, i.e., a conveyance to two people with nothing else appearing; or (2) where the circumstances, expressly or by necessary implication, call for a tenancy in common. See 86 C.J.S., Tenancy in Common, § 7. Also *Insurance Company v. Davis*, 68 N.C. 17 (1873).

Plaintiff cites *Bullman v. Edney*, 232 N.C. 465, 61 S.E. 2d 338 (1950), for authority for her position. We think the cases are distinguishable. In *Bullman*, the husband and wife purchased an automobile from the defendant with the understanding that the title would be placed in her name, as she was paying \$500 of the \$800 purchase price. Defendant was notified that the wife was making this payment and defendant-vendor was instructed by the wife to place title in her name. Clearly, in *Bullman*, there is evidence that the wife was acquiring an interest in the property. The wife was to hold title, her interest in fee simple, and the interest of her husband in trust. In the present case there is no showing that at the time of acquisition, plaintiff was to hold any interest in the property. She took no part in any transactions, signed no notes, and asserted no property rights.

The evidence shows at most that plaintiff advanced funds to her husband which he used to purchase personal property. In

State v. Canty

the absence of proof that a gift was intended, it is presumed there was a loan if a husband receives and uses his wife's money. 2 Lee, North Carolina Family Law, § 110, p. 41 (1963); *Etheridge v. Cochran*, 196 N.C. 681, 146 S.E. 711 (1929); and *Bowling v. Bowling*, 252 N.C. 527, 114 S.E. 2d 228 (1960). Therefore, it would appear that, under the facts of this case, plaintiff's only possible recourse would be an action for debt. Plaintiff failed to show any conveyance creating concurrent ownership, or any circumstances calling for a tenancy in common.

We hold that defendant's motion for judgment n.o.v. should have been granted.

Judgment reversed and cause remanded for proper judgment.

Chief Judge BROCK and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. MAURICE CANTY

No. 7413SC262

(Filed 5 June 1974)

Homicide § 28— instructions on self-defense, accident

The trial court in a homicide case adequately instructed the jury on defendant's contention that he had drawn his pistol as a legitimate act of self-defense and that its accidental discharge did not constitute criminal negligence.

APPEAL by defendant from *Brewer, Judge*, 10 September 1973 Session of Superior Court held in BRUNSWICK County.

Defendant was indicted for the murder of one Ossie Hall Hayes on 16 March 1973 in Brunswick County. He was tried for second degree murder. It was stipulated at the trial that Ossie Hall Hayes died 16 March 1973 as a result of a gunshot wound in the neck.

The State's evidence tended to show in substance that defendant met Carl Jones and his girl friend, Ozzie Mae Hayes, about 10:00 or 11:00 at night on 16 March 1973 at Myers Piccolo Joint. An argument ensued between Jones and the defendant and defendant invited Jones to come outside. Jones accepted the

State v. Canty

invitation and he and Ozzie Mae Hayes went outside with the defendant. Jones and defendant had a few words and Jones saw a gun in defendant's hands. He grabbed Ozzie Mae and was ducking behind her when the defendant shot her. After the gun fired, Jones ran and hid in the bushes. He heard defendant say he had shot the girl and was going to get him next. Later Jones returned, saw the body of Ozzie Mae lying on the ground, and called the rescue squad. Defendant had left the scene and did not return. When the rescue squad moved the body of Hayes, a steak knife was found near the body.

The defendant testified that there had been difficulty between him and Jones prior to their meeting at Myers place; that on this occasion Jones began cursing him and he left and went outside; that Jones followed him outside along with Ozzie Mae Hayes who was trying to stop Jones; that when Jones pulled a knife he drew his pistol; that Jones pushed Ozzie Mae Hayes into him and tried to stab him at which time his gun went off accidentally shooting Ozzie Mae Hayes.

The jury returned a verdict of guilty of involuntary manslaughter. From judgment imposing a sentence of 7 to 10 years imprisonment, defendant has appealed.

Attorney General Morgan, by Assistant Attorney General Conrad O. Pearson, for the State.

Murchison, Fox & Newton, by Carter T. Lambeth, for defendant appellant.

BALEY, Judge.

Defendant asserts as his sole assignment of error that the court in its charge did not adequately present his contention that he had drawn his pistol as a legitimate act of self-defense and that its accidental discharge did not constitute criminal negligence.

The record does not indicate any objection by defendant to the statement of his contentions nor was there any request to the court for correction. If there were any error, the defendant should have called such error to the attention of the court before the jury retired to consider its verdict. Failure to do so constitutes a waiver and is not reviewable on appeal. *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182; *State v. Thomas*, 284 N.C. 212, 200 S.E. 2d 3.

State v. Crouse

We have, however, carefully examined the charge of the court. It was detailed and comprehensive upon the right of self-defense and the application of that right to the evidence in this case. The contention of the defendant that the death of Ossie Hall Hayes was the result of an accident was fully presented to the jury. The right of the defendant to use his pistol in self-defense was made equally clear.

Involuntary manslaughter was defined by the court as "the unintentional killing of a human being by an unlawful act not amounting to a felony or an act done in a criminally negligent manner." The conviction for involuntary manslaughter implies that the jury considered the killing to be unintentional and resulting from criminal negligence in the use of firearms. There could be no criminal negligence, as that term was defined by the court, had defendant been acting in self-defense.

We find no error in the instructions to the jury. Defendant has no just cause for complaint in the verdict.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JESSIE LEE CROUSE

No. 7422SC335

(Filed 5 June 1974)

1. Crime Against Nature § 1— constitutionality of statute

The crime against nature statute is not unconstitutionally vague.

2. Criminal Law § 26; Crime Against Nature § 2; Rape § 1— double jeopardy — nolle prosequi of rape charge — trial for sodomy

Defendant was not placed in double jeopardy when the State took a *nolle prosequi* with leave after the jury was impaneled in a trial of defendant for rape and defendant was thereafter tried for sodomy growing out of the same occurrence, since rape and sodomy are distinct and separate crimes having different elements and an indictment for rape will not support a conviction for sodomy.

3. Criminal Law § 87— leading questions — seven-year-old sodomy victim

The trial court in a sodomy case did not err in permitting the solicitor to ask leading questions of the seven-year-old prosecutrix.

State v. Crouse

4. Criminal Law § 95— testimony admissible for corroboration — limiting instructions — absence of request

The trial court in a sodomy case did not err in failing to instruct the jury that testimony as to what the victim had told the witnesses about the crime was admissible only for the purpose of corroboration where defendant made no request for limiting instructions.

5. Criminal Law § 96— withdrawal of testimony — instruction to disregard

Defendant in a sodomy case was not prejudiced by testimony tending to show that defendant had committed another crime where defendant failed to object to part of the testimony and, when an objection was finally lodged, it was sustained and the jury was instructed to disregard the testimony.

6. Criminal Law § 86— questioning defendant about prior convictions — counsel at prior trials

Defendant failed to show prejudice in the court's allowing the solicitor to question defendant about prior convictions without determining whether defendant was represented by counsel at the proceedings resulting in those convictions.

7. Crime Against Nature § 2— jury instructions — court's understanding of First Book of Moses — history of the offense — genealogy of English royalty

In a prosecution for crime against nature, the trial judge's inclusion in his jury instructions of his understanding of the 18th and 19th Chapters of the First Book of Moses and his recitation of the statutory history of the crime against nature and the genealogy of English royalty, while disapproved, did not prejudice defendant.

APPEAL by defendant from *Copeland, Judge*, 26 November 1973 Session of Superior Court held in DAVIDSON County.

Defendant Jessie Lee Crouse was indicted for committing a crime against nature.

The evidence for the State included the testimony of Teresa Jean Fulk, age seven, that on 1 April 1972, defendant committed sodomy on her; that after the act defendant bathed her, changed her clothes and then took her to her grandmother. The State also offered the testimony of several other witnesses with whom Teresa Jean had discussed the crime. A doctor testified that when he examined Teresa Jean several hours after the alleged attack, the anal opening was markedly red, and tests revealed the presence of sperm in the rectum.

Defendant denied his guilt, stating that Teresa Jean wanted to go shopping with him so he bathed her and changed her clothes and that he noticed some sores on her bottom and put lotion on them.

State v. Crouse

The jury found defendant guilty, and he was sentenced to a prison term of 10 years.

Attorney General Robert Morgan by Richard F. Kane, Associate Attorney, for the State.

Jack E. Klass for defendant appellant.

VAUGHN, Judge.

[1] Defendant's contention that the bill of indictment should have been quashed because G.S. 14-177, the crime against nature statute, is unconstitutionally vague is overruled. We have previously held that the statute is constitutional. *State v. Moles*, 17 N.C. App. 664, 195 S.E. 2d 352.

[2] Defendant next contends that the trial court erred in not quashing the indictment upon a plea of former jeopardy. Defendant was indicted for rape of Teresa Jean Fulk. After a jury was impaneled in the rape case, the State took a *nolle prosequi* with leave. About this time, the indictment for crime against nature was returned. Rape and sodomy are distinct and separate crimes each having different elements. An indictment for rape would not support a conviction for sodomy. Although both indictments against defendant involved the same transaction, they did not charge offenses which were the same in law and fact. Consequently, defendant has not been twice put in jeopardy for the same offense.

[3] Defendant argues that the court improperly allowed the solicitor to use leading questions in eliciting testimony from Teresa Jean Fulk. Given the circumstances surrounding this case, whether to permit leading questions was within the court's discretion. *State v. Payne*, 280 N.C. 150, 185 S.E. 2d 116. In view of the nature of the crime and the extreme youth of the witness, the court did not abuse its discretion in allowing the questions as propounded by the solicitor.

[4] Defendant further contends that the court erred in not giving limiting instructions when it allowed several witnesses to testify to what Teresa Jean Fulk had told them about the crime in question. Since defendant did not request the court to instruct that the testimony was admissible solely for the purpose of corroboration, he may not now complain about the lack of limiting instructions. *State v. Tuttle*, 207 N.C. 649, 178 S.E. 76.

State v. Crouse

[5] Defendant maintains that testimony tending to show that defendant "had committed another distinct, independent or separate offense" should have been excluded. This assignment of error is without merit. Defendant failed to object to part of the testimony, and when an objection was finally lodged, it was sustained and the jury was properly instructed to disregard the testimony.

[6] On appeal, defendant contends that the court erred in allowing the solicitor to question defendant about prior convictions of criminal offenses without first determining whether defendant was represented by counsel at the proceedings resulting in those convictions. Defendant's testimony on cross-examination is set out in narrative form and does not contain the solicitor's questions. In several instances defendant admitted his prior criminal conduct without saying whether he had been tried for these crimes. No objections were made at trial and, on appeal, defendant has failed to show prejudicial error.

[7] Defendant brings forward numerous assignments of error directed to the court's instructions to the jury. Again, as he did in *State v. Gray*, 21 N.C. App. 63, 203 S.E. 2d 88, the trial judge gave the jury his understanding of the 18th and 19th Chapters of the First Book of Moses, called Genesis. He also recited some of the statutory history of the act which defendant was charged and the genealogy of English royalty. Although the judge's monologue was inappropriate, we do not believe the error was prejudicial to the defendant. For an article on the history and meaning of the statute, see 32 N.C. L. Rev. 312. Defendant's other exceptions to the charge are also overruled. We have considered all of defendant's assignments of error and hold that he had a fair trial without prejudicial error.

No error.

Judges CAMPBELL and MORRIS concur.

Rock v. Ballou

SHERMAN T. ROCK AND HARVEY HAMILTON, JR. v. G. WARD
BALLOU AND RALPH G. STYRON

No. 743SC233

(Filed 5 June 1974)

Attorney and Client § 7— contingent fee agreement — entry during attorney-client relationship — reasonableness

Action by attorneys to recover upon a contingent fee agreement entered into during the existence of the attorney-client relationship is remanded for findings as to whether the agreement is reasonable and whether it was fairly and freely made, with full knowledge by defendants of its effect and of all the material circumstances relating to the reasonableness of the fee.

APPEAL by defendants from *Cowper, Judge*, 30 July 1973 Session of Superior Court held in CARTERET County.

This is an action by attorneys to recover fees for services rendered to defendants pursuant to a contract. The case was heard by the court without a jury.

Plaintiffs' evidence tended to show that defendants employed them to examine the title to a tract of land. Plaintiffs concluded that the title was not marketable and advised defendants of this fact. Plaintiffs also told defendants that the only chance of getting good title was a proceeding under the Torrens Law. Defendants were unwilling to obligate themselves for the fees and expenses for such a proceeding without assurance of marketable title. The parties then entered into a contingent fee agreement whereby plaintiffs would receive one-fourth of the profit to be received by defendants from the sale of the land. This was later reduced to one-fifth of the profit. The Torrens System was completed as to the tracts involved, and defendants refused to account to plaintiffs for their share of the profit.

The judge made findings of fact and concluded that the parties entered into a binding contract whereby plaintiffs were to recover twenty percent of the net profit from the sale of the land, that plaintiffs performed this contract and that plaintiffs were entitled to judgment in the amount of \$7,106.06. Judgment was entered in favor of plaintiffs for that amount.

Wheatley & Mason, P.A. by L. Patten Mason for plaintiff appellees.

D. S. Henderson and P. H. Baxter, Jr., for defendant appellants.

Rock v. Ballou

VAUGHN, Judge.

It has been held that a contract between an attorney and his client fixing the attorney's compensation for his services, if made while the relationship of attorney and client is in existence, is void as a matter of law and the attorney can recover no more than he would have the right to demand if no contract had been made. *Stern v. Hyman*, 182 N.C. 422, 109 S.E. 79. There, as here, the contract was for a contingent fee. The rule, as stated in *Stern*, appears to be both unfair and unrealistic.

A better rule would appear to be the generally accepted view as stated by Justice Lake in *Randolph v. Schuyler*, 284 N.C. 496, 201 S.E. 2d 833.

"The generally accepted view appears to be that a contract made between an attorney and his client, during the existence of the relationship, concerning the fee to be charged for the attorney's services, will be upheld if, but only if, it is shown to be reasonable and to have been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee. The burden of proof is upon the attorney to show the reasonableness and the fairness of the contract, not upon the client to show the contrary. (Citations omitted.) Contracts for contingent fees, especially, are closely scrutinized by the courts where there is any question as to their reasonableness, irrespective of whether made prior to the commencement of or during the attorney-client relationship."

There is evidence in the record which would permit but not require the court to find that plaintiffs had carried the burden required by the generally accepted view, but no findings as to those matters were made. The judgment is reversed, and the cause is remanded for a new trial where the court will, among other things, make findings as to whether the contract is reasonable and was fairly and freely made, with full knowledge by the defendants of its effect and of all the material circumstances relating to the reasonableness of the fee.

New trial.

Judges CAMPBELL and MORRIS concur.

State v. Cannady

STATE OF NORTH CAROLINA v. FREDERICK EARL CANNADY
AND WILLIE BURNICE HINNANT

No. 747SC216

(Filed 5 June 1974)

1. Criminal Law § 92— consolidation of charges against two defendants

The trial court did not err in consolidating for trial charges against two defendants for malicious damage to real and personal property by use of an explosive.

2. Criminal Law § 75— voluntariness of confessions — hope of lower bond — belief accomplice had implicated defendants

Defendants' confessions were not rendered involuntary by the fact they may have been made with the hope that lower bond would be set or in the belief that another participant in the crime had implicated them.

APPEAL by defendants from *Lanier, Judge*, 13 August 1973 Session of Superior Court held in NASH County.

For disposition of these cases on a prior appeal, *see State v. Cannady* and *State v. Hinnant*, 18 N.C. App. 213, 196 S.E. 2d 617. Defendants were separately indicted for maliciously and feloniously damaging the real and personal property of another by the use of an explosive. The cases were consolidated for trial.

The State's evidence tended to show that defendant Cannady was displeased with treatment he received during the course of his dealings at Stanhope Grocery and Hardware Company. Defendant Cannady asked defendant Hinnant to procure some dynamite. In the early morning of 31 March 1972, the defendants and one Bertis (Blue Boy) Evans drove to the vicinity of the Stanhope Grocery in a vehicle operated by "Blue Boy." The three wrapped a stick and a half of dynamite with string and positioned a fuse and blasting cap. Defendant Hinnant supplied the components for the bomb. Defendant Cannady lit the fuse, and defendant Hinnant rolled it up to the door of the store. Defendants ran back to the car, and "Blue Boy" drove off. Shortly thereafter, the group heard an explosion.

Testifying in their own behalf, both defendants Hinnant and Cannady denied participating in the bombing and claimed they were at their respective homes on the night of the incident.

State v. Cannady

The jury found both defendants guilty as charged. Defendant Cannady was sentenced to a term of 15-18 years, and defendant Hinnant was sentenced to 12-15 years.

Both defendants appealed.

Attorney General Robert Morgan by Norman L. Sloan, Associate Attorney, for the State.

Moore, Diedrick & Whitaker by T. G. Diedrick and Turnage and Horton by Frederick E. Turnage, attorneys for defendant appellants.

VAUGHN, Judge.

[1] Defendants contend that the court erred in consolidating the cases for trial. As defendants concede, the decision to consolidate rests in the discretion of the trial court, *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492, and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Fox, supra*; *State v. Yoes and Hale v. State*, 271 N.C. 616, 157 S.E. 2d 386; *State v. McCall* and *State v. Sanders* and *State v. Hill*, 12 N.C. App. 85, 182 S.E. 2d 617, *cert. den.*, 279 N.C. 513. No abuse of discretion has been shown.

[2] Defendants argued that their respective confessions were improperly admitted into evidence. After an extensive *voir dire* examination, the court concluded that none of the defendants' constitutional rights had been violated in connection with the statements. The court's findings are based on competent evidence, including, among other things, written waivers signed by the defendants. The issue on *voir dire* is whether the incriminating statements were voluntarily made. *State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610; *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1. That defendants may have made their statements with the hope that lower bond would be set or in the belief that another participant in the crime implicated them does not render their statements involuntary.

We have carefully considered defendants' other assignments and find no prejudicial error.

No error.

Judges CAMPBELL and MORRIS concur.

State v. Logan

STATE OF NORTH CAROLINA v. WILLIAM LOGAN

No. 7426SC353

(Filed 5 June 1974)

1. Criminal Law § 15; Jury § 2— newspaper articles — change of venue — special venire — continuance

In a prosecution for distribution of heroin and marijuana, the trial court did not err in the denial of defendant's motions for removal to another county, a special venire and a continuance based on a series of articles which appeared in local newspapers.

2. Criminal Law § 86— cross-examination of defendant — specific criminal acts

The solicitor was properly allowed to ask defendant whether he had committed specified criminal acts for which defendant was under indictment at the time of the trial.

3. Criminal Law § 34— prior drug transactions — admissibility

In a prosecution for distribution of heroin and marijuana, an officer was properly allowed to testify about prior drug transactions he had had with defendant for the purpose of showing intent, motive and guilty knowledge, notwithstanding defendant on cross-examination had denied participating in those transactions.

APPEAL by defendant from *Ervin, Judge*, 3 December 1973 Session of Superior Court held in MECKLENBURG County.

Defendant was charged in two bills of indictment with feloniously distributing heroin and marijuana.

The State's evidence tended to show that on 6 June 1973, defendant sold a quantity of heroin and marijuana to Larry R. Snyder, an undercover agent employed by the Charlotte Police Department.

Defendant denied selling the drugs and denied seeing Snyder on the occasions the sales were alleged to have been made.

Upon a verdict of guilty, defendant was sentenced to a prison term of five years on each count.

Defendant appealed.

Attorney General Robert Morgan by Parks H. Icenhour, Assistant Attorney General, for the State.

Olive, Howard, Downer, Williams & Price by Paul J. Williams for defendant appellant.

State v. Logan

VAUGHN, Judge.

[1] We find no merit in defendant's contentions that a series of articles which appeared in local newspapers were so prejudicial that they undermined the possibility of a fair trial in Mecklenburg County and that the court thus erred in denying defendant's motions for removal to another county, a special venire and a continuance. The court did not abuse its discretion in denying the motions. In a related challenge, defendant asserts that the court should have declared a mistrial after the appearance of several newspaper articles about defendant's trial. These assignments of error are overruled.

[2] Defendant next asserts that the Solicitor was improperly allowed to ask defendant whether he had previously committed certain other criminal offenses. At the time of the trial, defendant was under indictment for some of those offenses. The Solicitor did not ask whether defendant had been indicted for any of these offenses but whether he committed the acts. It was proper for the Solicitor to attack defendant's credibility in this manner. Although a defendant may not be asked whether he was indicted for a given act, he may, for purposes of impeachment, be asked if he has committed specific criminal acts. *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874.

[3] Defendant further contends that Officer Snyder should not have been permitted to testify about prior drug transactions he had with defendant which were unrelated to the present case. On cross-examination, defendant had denied participating in those transactions. Defendant argues that when a defendant is asked whether he has committed a criminal offense, his answer is conclusive and may not be contradicted by other evidence. We hold that the evidence was properly admitted to show intent, motive and guilty knowledge. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364; *State v. Johnson*, 13 N.C. App. 323, 185 S.E. 2d 423, cert. granted, 280 N.C. 724, appeal dismissed, 281 N.C. 761.

We have carefully considered defendant's other assignments of error including those relating to the court's modification of a limiting instruction during trial and its refusal to grant a mistrial after the jury was polled. We find no prejudicial error.

No error.

Judges CAMPBELL and MORRIS concur.

State v. Cloer

STATE OF NORTH CAROLINA v. TOMMY DALE CLOER

No. 7422SC450

(Filed 5 June 1974)

1. Witnesses § 1— competency of witness

The trial court in an armed robbery case did not abuse its discretion in allowing an accomplice to testify although defendant contended his testimony should not have been admitted because he had been drinking before the robbery and because he had been in mental institutions on several occasions.

2. Criminal Law § 89— corroboration — prior consistent statements

It was proper to corroborate the testimony of a witness with evidence that he had, prior to trial, made statements consistent with his testimony at trial.

APPEAL by defendant from *Wood, Judge*, 7 January 1974
Session of Superior Court held in IREDELL County.

Defendant was tried for armed robbery. Evidence for the State tended to show the following. Sometime after 11:00 p.m. on 28 August 1973, defendant went to James Hooper's apartment and told him he needed money and told Hooper that he wanted his help in robbing a Spur service station. Shortly before 11:45 p.m., the pair proceeded down Mulberry Street towards the station which was located at the corner of Front and Mulberry Streets in Statesville. A hedge separated the Spur Station from the adjoining property. They stopped at the hedge, and defendant told Hooper, "you go in first, I'll come in behind you in about 30 seconds." Defendant stayed at the hedge, and Hooper went to the front of the station and took money from an attendant by the threatened use of a pistol. Hooper called for defendant but there was no reply. Hooper directed the attendant to the hedge and again called for defendant. Hooper made the attendant lie down behind the hedge and returned to the front of the station. Someone had reported the robbery while it was in progress, and Hooper was seized when he returned to the front of the station. The police took a switchblade knife and a .22 Caliber pistol from Hooper. A resident of the neighborhood also saw defendant in the area. As a police car approached, defendant ran down the street and disappeared behind some bushes. He was formally charged with the robbery in a warrant issued on 30 August 1973.

The jury returned a verdict of guilty of armed robbery, and a prison sentence of from ten to fifteen years was imposed.

Maxwell v. Perry

*Attorney General Robert Morgan by Jerry J. Rutledge,
Associate Attorney General, for the State.*

Jay F. Frank for defendant appellant.

VAUGHN, Judge.

[1, 2] The coparticipant in the robbery, Hooper, testified for the State. He had previously given the officers a statement of the details of the planning and execution of the robbery. Defendant contends Hooper's testimony should not have been admitted because Hooper had been drinking before the robbery and because he had been in mental institutions on several occasions. There was no abuse of discretion by the trial judge when he allowed the witness to testify. It was also entirely proper to corroborate the testimony of the witness with evidence that he had, prior to trial, made statements consistent with his testimony at trial. Defendant's objections to the introduction of the pistol and knife which the State contended were used in the robbery were also properly overruled.

The case was one for the jury. The State's evidence was sufficient to permit the jury to find that defendant procured Hooper to help with the robbery, accompanied him to the scene of the offense and remained close enough to be of assistance and encourage the commission of the robbery.

Defendant's court appointed counsel has brought forward other assignments of error which we have considered. We find no prejudicial error.

No error.

Judges PARKER and CARSON concur.

DONALD MAXWELL, T/A G. & M. FLOOR COVERING v. JOHN R.
PERRY, JR. AND RILLA ROTHROCK

No. 7422DC455

(Filed 5 June 1974)

Laborers' and Materialmen's Liens § 3— action against owner — failure to show agency of contractor for owner

In an action against a contractor and an owner to recover for labor and materials furnished in the construction of a house, the trial

Maxwell v. Perry

court properly dismissed the action against the owner where plaintiff's evidence showed that his services were engaged by the contractor and plaintiff presented no evidence of authority from the owner to the contractor to bind the owner for any purchases made by the contractor.

APPEAL by plaintiff from *Cornelius, Judge*, 11 December 1973 Session of DAVIDSON County, General Court of Justice, District Court Division.

Heard in the Court of Appeals 15 May 1974.

Plaintiff brought this action for labor and materials in the installation of formica cabinet tops, vinyl floor covering, carpets and ceramic walls. The labor and materials were furnished in the construction of a house on land owned by Rilla Rothrock (owner). The house was being constructed by the defendant Perry (contractor).

Plaintiff alleged and offered evidence tending to show that he started furnishing the labor and materials for the house under construction on 31 May 1972; that his services were engaged by the contractor; that he had never had any conversation or dealings with the owner and had not sent her any bills or any notice of his claim and so far as he knew the first notice the owner had of his claim was when suit was instituted and the sheriff served papers on her. The plaintiff testified that he had not been paid anything for his labor and materials by either the contractor or the owner.

At the conclusion of the plaintiff's evidence, the owner made a motion to dismiss the action for failure to make out the case. This motion was sustained by the trial court, and the action was dismissed as to the owner. Plaintiff appealed.

William H. Steed for plaintiff appellant.

Wilson and Biesecker by Joe E. Biesecker for defendant appellee, Rilla Rothrock.

CAMPBELL, Judge.

Plaintiff assigns as error the dismissal of his claim against the owner. Plaintiff asserts that the owner admitted that Perry was the contractor to build the house in question and that, by virtue of such a contract, the owner was obligated for any labor and material used in the house and procured by the contractor.

Grose v. West

This is an incorrect assumption. A contractor as such is not a general agent for the owner. The relationship between the owner and the contractor would depend upon what type of contract had been entered into. In the absence of any showing as to the type of contract between the owner and the contractor, the contractor would have no authority to bind the owner in any way. See *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E. 2d 653 (1965).

In the instant case the plaintiff has failed to show any authority from the owner to the contractor to bind the owner for any purchases made by the contractor. The burden was upon the plaintiff to show that the owner was obligated to pay for the material and labor furnished by the plaintiff at the request of the contractor. The plaintiff has not carried this burden in the instant case; and, therefore, the trial court was correct in dismissing the action.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

PAUL GROSE, ADMINISTRATOR OF THE ESTATE OF FANNIE CORNELIA WALSH, DECEASED v. WALTER A. WEST AND WIFE, CARRIE W. WEST; AND R. F. KITE

No. 7423DC283

(Filed 5 June 1974)

Bills and Notes § 20— liability on promissory note

The evidence supported the trial court's determination that appellant was liable on a promissory note executed to plaintiff's intestate.

APPEAL by defendant Kite from *Osborne, Judge*, 15 October 1973 Session of WILKES County, the General Court of Justice, District Court Division.

Heard in the Court of Appeals 14 May, 1974.

This action was instituted to collect a \$2,500.00 promissory note under seal executed by the defendants Walter A. West and R. F. Kite dated 6 March 1967, together with interest thereon at the rate of 6% from June 6, 1967 (which was apparently the

Grose v. West

due date of the note). There was a second cause of action stated in the complaint which involved Carrie W. West but was not brought forward on appeal. Walter A. West and wife, Carrie W. West, filed no pleadings and did not resist the cause of action. The defendant Kite filed an answer denying the execution of the note or any indebtedness thereon.

The case was tried before the judge and without a jury.

The judge found that West and Kite executed the note under seal to Fannie Walsh in the sum of \$2,500.00; that said note was due and payable on 6 June 1967; that demand had been made on the makers and that no portion of the note had been paid and that judgment by default had been taken against the defendant West. The judge then entered conclusions of law to the effect that West and Kite, as co-makers, were jointly and severally liable to the plaintiff; that plaintiff was entitled to recover from Kite the sum of \$2,500.00, plus interest, at the rate of 6% per annum from 6 June 1967. The judge then entered judgment against Kite in the sum of \$2,500.00, plus interest, at the rate of 6% per annum from 6 June 1967, together with the costs of the action. From the entry of this judgment, the defendant Kite appealed.

Brewer and Bryan by Dennis R. Joyce for plaintiff appellee.

Eric Davis for defendant appellant, R. F. Kite.

CAMPBELL, Judge.

The evidence was sufficient to support the findings of fact entered by the judge, and those facts were sufficient to support the conclusions of law and the judgment.

We find no prejudicial error in the trial of this case.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

Sparks v. Choate

J. WOODROW SPARKS v. A. VANCE CHOATE

No. 7423DC435

(Filed 5 June 1974)

Estoppel § 1— warranty deed — estoppel to claim easement

A person who joined in the execution of a general warranty deed without limitation, reservation or exception was estopped to assert a claim of right of way by easement over the land conveyed.

APPEAL by plaintiff from *Osborne, District Court Judge*, 23 January 1974 Session of District Court held in ALLEGHANY County. Argued in the Court of Appeals 15 May 1974.

Plaintiff filed a complaint seeking injunctive relief from defendant's interfering with plaintiff's use of a right of way across defendant's property, and seeking damages in the amount of \$500.00.

In his answer, defendant denied the existence of a right of way across his land, pleaded estoppel as a bar to plaintiff's action, and prayed for damages in the amount of \$5,050.00.

The trial court concluded that the plaintiff is barred by estoppel by deed to assert a claim of an easement of right of way across defendant's land, and that defendant should receive \$100.00 in damages.

Plaintiff appealed to this Court.

Edmund I. Adams and Arnold L. Young, for the plaintiff.

Wade E. Vannoy, Jr., and Jimmy D. Reeves, for the defendant.

BROCK, Chief Judge.

The sole issue is whether the trial court committed error in concluding as a matter of law that a person who joins in the execution of a general warranty deed without limitation, reservation, or exception, is later estopped to assert a claim of right of way over the land conveyed by such deed.

On 10 August 1963, plaintiff and other co-tenants conveyed by a general warranty deed, without exception, a tract of land to Monroe Holloway and wife, Clyde Holloway. On 16 August 1968, defendant acquired by warranty deed without reservation

State v. Leonard

the same tract conveyed to the Holloways by plaintiff and others in 1963. On 15 June 1970, plaintiff received a deed from Mattie Edwards conveying land originally known as the "Freel Crouse" land which adjoins the land conveyed to the Holloways and subsequently to defendant.

Plaintiff contends his easement of right of way exists by virtue of the reservation of an easement in an 1898 deed which excepts from that tract of land now owned by defendant "... a right of way for a road from Freel Crouse's land to the public road at some convenient point."

Plaintiff warranted to defendant's predecessor in title that the land was free and clear of all encumbrances, and that plaintiff would defend title to the tract against the claim of all persons whomsoever. Now, through a conveyance from an independent source, plaintiff is seeking to retain an interest in property which he had heretofore conveyed with full warranty.

In our opinion, the trial court properly concluded as a matter of law that plaintiff is estopped from asserting a claim of an easement of right of way across defendant's land.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. DAVID CHARLES LEONARD

No. 7422SC433

(Filed 5 June 1974)

Criminal Law § 90— allowing State to examine own witness as hostile witness

The trial court did not err in granting the State's motion to be allowed to examine its own witness as a hostile witness where the witness unexpectedly attempted, through vague answers, to avoid giving specific and detailed material testimony which he had previously included in voluntary statements given to law officers.

ON *Certiorari* to review defendant's trial and conviction before *Rousseau, Judge*, 21 June 1973 Session of Superior Court held in DAVIDSON County.

Defendant was indicted for feloniously receiving stolen goods, to which he pled not guilty. The State's evidence showed:

State v. Leonard

In the late evening of 20 March 1973, State's witness Timothy Coe and four other youths broke into Temple's Grocerteria in Lexington, N. C., removed therefrom approximately \$1,300.00 worth of merchandise, including knives, stereophonic equipment and ammunition, and carried the same to the living room of defendant's house. Earlier in the day, defendant had been told of the planned break in, and he had told Coe and the others what items to look for. Defendant was present when the stolen goods were delivered to his house and supervised their placement in his living room. Armed with a search warrant, investigating officers discovered the bulk of the stolen goods in the attic of defendant's house at 6:00 a.m. on the morning after the break in. The jury found defendant guilty as charged, and judgment was entered thereon imposing sentence of imprisonment. Defendant gave notice of appeal. To permit perfection of the appeal, this Court subsequently granted his petition for writ of certiorari.

Attorney General Robert Morgan by Associate Attorney Robert R. Reilly for the State.

Larry L. Eubanks for defendant appellant.

PARKER, Judge.

The single question for review is presented by defendant's contention that the trial court erred in granting, over timely objection, the State's motion to be allowed to examine its own witness, Timothy Coe, as a hostile witness. The record indicates that at the beginning of direct examination, immediately before the State's motion, Coe unexpectedly attempted, through vague answers, to avoid giving specific and detailed material testimony which he had previously included in voluntary statements given to law officers. In thereafter allowing the solicitor to examine Coe with leading questions based upon these prior statements, the trial court did not abuse its discretion. It is clear that the solicitor was taken by surprise by the witness's evasive answers, and the questions were not asked for the purpose of discrediting the witness, but to give the witness opportunity "to set the matter right." See *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561.

No error.

Judges VAUGHN and CARSON concur.

Town of Wadesboro v. Holshouser

TOWN OF WADESBORO, A MUNICIPALITY v. JAMES E. HOLSHOUSER, AS GOVERNOR OF NORTH CAROLINA AND INDIVIDUALLY; DAVID R. JONES, AS SECRETARY OF THE DEPARTMENT OF SOCIAL REHABILITATION AND CONTROL AND INDIVIDUALLY; BERNIE SELLERS, AS DIRECTOR OF THE PROBATION DEPARTMENT AND INDIVIDUALLY; CHARLES HESTER, AS DISTRICT DIRECTOR OF THE PROBATION DEPARTMENT AND INDIVIDUALLY

No. 7420SC307

(Filed 5 June 1974)

Appeal and Error § 9— repeal of statute — moot case

Appeal is dismissed as moot where the statutory basis for plaintiff's case has been repealed.

APPEAL by plaintiff from *Armstrong, Judge*, 13 November 1973 Civil Session of Superior Court held in ANSON County.

Plaintiff municipality filed this action on 23 October 1973 seeking to enjoin defendants from closing the district headquarters office of the State Probation Commission in the Town of Wadesboro and seeking a mandatory order requiring defendants to proceed with the building of a headquarters building in said Town, funds for which had been appropriated by Sec. 4 of Chapter 523 of the 1973 Session Laws. Defendants filed motion to dismiss under Rule 12 or for summary judgment under Rule 56, stating as grounds that the court lacked jurisdiction both over the subject matter and over the person, that the complaint failed to state a claim upon which relief can be granted, and that the doctrine of sovereign immunity barred the action.

The trial court allowed the motion, finding this action to be one against the State for which the State had not waived its immunity, that the complaint failed to state a claim upon which the relief prayed for can be granted, and that in any event the plaintiff Town lacked standing to maintain such a suit. From the judgment dismissing the action, plaintiff appealed.

Henry T. Drake for plaintiff appellant.

Attorney General Robert Morgan by Assistant Attorney General John R. B. Matthis for defendants.

PARKER, Judge.

We find it unnecessary to pass upon the questions which plaintiff seeks to present by this appeal. Plaintiff's case is

State v. Harding

predicated entirely upon a capital improvement appropriation of \$200,000.00 made by Chapter 523 of the 1973 Session Laws for a Probation Commission "Headquarters Building—Wadesboro." By Chapter 1412 of the 1973 Session Laws (2nd Session, 1974), which was ratified and effective 12 April 1974, the Legislature found that "the operation of a Probation Commission Office in Wadesboro is no longer required," and amended Chapter 523 of the 1973 Session Laws by transferring the \$200,000.00 appropriation to another purpose. The statutory basis for plaintiff's case having been repealed, we find this appeal moot and it is

Dismissed.

Judges VAUGHN and CARSON concur.

STATE OF NORTH CAROLINA v. WILLIE G. HARDING

No. 7423SC418

(Filed 5 June 1974)

1. Assault and Battery § 15— instructions defining assault — failure to include "unlawful"

In a felonious assault prosecution, the trial court did not err in failing to include the term "unlawful" in its definition of assault.

2. Assault and Battery § 15— failure to instruct on self-defense — denial of shooting

The trial court in a felonious assault prosecution did not err in failing to instruct on self-defense where defendant denied he shot the prosecuting witness.

APPEAL by defendant from *Godwin, Judge*, 28 January 1974 Session of Superior Court held in YADKIN County.

Defendant was charged in a bill of indictment, in regular form, with assault with a deadly weapon (a .22 calibre rifle) with the intent to kill and inflicting serious injury, a violation of G.S. 14-32(a). He entered a plea of not guilty, the jury returned a verdict of guilty of assault with a deadly weapon, and judgment was entered ordering defendant imprisoned for a term of two years.

State v. Harding

Attorney General Robert Morgan, by Associate Attorney Norman L. Sloan, for the State.

Lafayette Williams for defendant.

BRITT, Judge.

Defendant assigns as error the failure of the trial court to comply with G.S. 1-180 in its instructions to the jury. He contends that the court erred (1) in failing to include the term "unlawful" in its definition of assault, and (2) in failing to instruct on self-defense. Neither contention has merit.

[1] The court did not err in failing to include the term "unlawful" or "unlawfully" in its definition of assault. Generally, an assault is defined as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." 1 Strong, N. C. Index 2d, Assault and Battery, § 4, page 297 as approved by *State v. Roberts*, 270 N.C. 655, 155 S.E. 2d 303 (1967). Upon a finding of these elements, an assault is determined to have occurred, and it is not required that the jury find that an assault is "unlawful."

[2] We come now to defendant's contention that he was entitled to jury instructions on self-defense. The State's evidence, in pertinent part, tended to show: Defendant had been at a trailer occupied by Bobby Ray Anthony (Anthony), the victim. After dark defendant left and returned to his own home. Sometime later, Anthony, along with two others, decided to go to a store to buy cigarettes and stopped at defendant's home to inquire if he wanted anything from the store. Anthony and the other two got out of the car and started toward the steps when defendant appeared at the top of the steps with a rifle and a flashlight and ordered those approaching to stay back. Anthony, who was behind the others, then appeared from around the corner of the house and was shot by defendant.

As a witness for himself, defendant testified in pertinent part: He was in his home when he heard some people approach. He heard the people talking but he remained in his house. He heard a gun fire. Although he owned a rifle and had it with him at the time, he did not fire the rifle. He flatly denied shooting anyone.

Simmons v. Simmons

By denying the shooting, defendant rendered it unnecessary for the court to instruct the jury on self-defense. In fact, instructions on self-defense would have been prejudicial to defendant as the court would have been suggesting, in effect, that defendant admits the shooting but contends it was justified. His defense was a denial of, not a justification for, the shooting.

No error.

Chief Judge BROCK and Judge CAMPBELL concur.

MARIE D. SIMMONS v. HUGHES A. SIMMONS

No. 7422DC314

(Filed 5 June 1974)

Divorce and Alimony § 18— alimony pendente lite — insufficiency of findings

The trial court erred in awarding alimony *pendente lite* to the wife where the court made findings with respect to the wife's poor physical condition and her need for additional monthly income but made no finding as to whether the wife had any separate estate or financial resources whereon to subsist during the prosecution of her action and to defray the necessary expenses thereof.

DEFENDANT appeals from *Hughes, Judge*, September 1973 Session of District Court held in DAVIDSON County.

This is an appeal by defendant, husband of plaintiff, from an order awarding child support, alimony pendente lite, and counsel fees.

DeLapp, Hedrick and Harp, by Sim A. DeLapp, for plaintiff appellee.

Wilson & Biesecker, by J. Lee Wilson, for defendant appellant.

BRITT, Judge.

Defendant contends that the evidence presented, and the findings made by the trial judge, were not sufficient to support the order appealed from. We agree with the contention in one particular.

Forbes v. Pillmon

To qualify for alimony pendente lite, a dependent spouse must show, among other things, that said spouse does not have sufficient means whereon to subsist during the prosecution or defense of his or her action and to defray the necessary expenses thereof. G.S. 50-16.3(a)(2). When an application is made for alimony pendente lite, and a hearing is held pursuant to the application, the judge must find the facts from the evidence presented. G.S. 50-16.8(f). "At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse as in the same manner as alimony." G.S. 50-16.4.

In the case at hand, while the court made findings with respect to plaintiff's poor physical condition and her need for additional monthly income, the court made no finding as to whether plaintiff had any separate estate or financial resources whereon to subsist during the prosecution of her action and to defray the necessary expenses thereof. For that reason, the order appealed from is vacated and the cause is remanded for further proceedings.

Error and remanded.

Chief Judge BROCK and Judge CAMPBELL concur.

J. M. FORBES, T/A FORBES' FLORIST-ALUMINUM PRODUCTS-
REALTOR v. SAM PILLMON, T/A CHOWAN BEACH

No. 746DC366

(Filed 5 June 1974)

Quasi Contracts § 2— measure of damages — doors not installed

In an action seeking recovery on *quantum meruit*, the trial court erred in instructing the jury that it should consider whether plaintiff should be compensated for certain doors if it found that defendant had prevented plaintiff from installing the doors, since plaintiff's recovery is limited to the reasonable value of goods and services accepted and appropriated by defendant.

APPEAL by defendant from *Blythe, District Court Judge*,
29 October 1973 Session of District Court held in HERTFORD
County.

Forbes v. Pillmon

This is an action seeking recovery on *quantum meruit*. An earlier appeal in the same case is reported in *Forbes v. Pillmon*, 18 N.C. App. 439, 197 S.E. 2d 226. At the second trial, plaintiff apparently abandoned efforts to recover on an alleged express contract. Evidence was conflicting on the quality of the services performed by plaintiff. The jury awarded damages in the amount of \$4,000.00 and judgment was entered for that amount.

No counsel for plaintiff appellee.

Cherry, Cherry and Flythe by Ernest L. Evans for defendant appellant.

VAUGHN, Judge.

Defendant contends that the court erred in its instructions on *quantum meruit* as the measure of damages. Defendant tendered written instructions to the court which it declined to adopt. The court charged, in part, that the measure of damages

“is the reasonable value of the labor and materials accepted and appropriated by Mr. Pillmon and these alone for which Mr. Pillmon must pay under the theory of quantum meruit unless you find that Mr. Pillmon, through his own actions, prevented Mr. Forbes from completing the building and, in this instance, the contention is installing the doors. I say that if you find that Mr. Pillmon prevented him from installing the doors, then it would be your duty to consider whether or not Mr. Forbes should be compensated and paid for the doors. . . .”

While the first portion of the above quoted instructions accurately defines the limits of *quantum meruit* recovery, that portion relating to the effect of the uninstalled doors on the measure of damages is incorrect. Plaintiff's right of recovery in this case is not bottomed on the existence of an express contract. Defendant was thus under no obligation to accept the doors. Plaintiff's recovery must be limited to the reasonable value of the goods and services accepted and appropriated by defendant. *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362; *Thormer v. Mail Order Co.*, 241 N.C. 249, 85 S.E. 2d 140. The purpose of allowing *quantum meruit* recovery is the prevention of unjust enrichment. See *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507; *Thormer v. Mail Order Co.*, *supra*. Absent an express agreement, when goods or services are accepted and appropriated by one from another, the law raises

State v. May

an implied promise on the part of the recipient to pay. *Builders Supply v. Midyette, supra*; *Stout v. Smith*, 4 N.C. App. 81, 165 S.E. 2d 789. The court's inaccurate instructions on this issue constituted prejudicial error. There must be a new trial.

New trial.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. THOMAS MAY AND
REGINALD GATLIN

No. 743SC204

(Filed 5 June 1974)

Criminal Law § 126— incomplete verdict — question by clerk — acceptance of verdict

Where the jury foreman stated the verdict as "Guilty of controlled substance, marijuana," omitting the word "possession," the clerk then asked, "Guilty of possession of a controlled substance, marijuana? And this is your verdict, so say you all?" and the jury responded, "Yes, sir," the clerk did not improperly suggest a verdict to the jury and a verdict of guilty of possession of marijuana was properly accepted by the court.

APPEAL by defendants from *Rouse, Judge*, 1 October 1973 Session of Superior Court held in PITT County.

Defendants, Thomas May and Reginald Gatlin, were separately indicted for the felonious possession with intent to distribute the controlled substance marijuana.

The State offered evidence indicating that two Greenville police officers observed the defendants as they discarded several small envelopes containing vegetable matter which the defense stipulated was marijuana.

Defendants offered no evidence. The jury found each defendant guilty of possession of a controlled substance, marijuana, and each was sentenced to a prison term of six months.

Defendants appealed.

State v. May

Attorney General Robert Morgan by H. A. Cole, Jr., Assistant Attorney General, for the State.

Laurence S. Graham and Nelson B. Crisp, attorneys for defendant appellants.

VAUGHN, Judge.

Since defendant May brings forward no assignments of error, his appeal only raises the question of whether error appears on the face of the record. *State v. McIlwain*, 279 N.C. 469, 183 S.E. 2d 538. Defendant was tried under an indictment proper in form by a duly constituted court, the verdict supports the judgment, and defendant was sentenced to a prison term within the applicable statutory limits.

Defendant Gatlin's only argument is that he contends the verdict does not support the judgment against him. Defendant bases his argument on the fact that the jury foreman stated the verdict as "Guilty of controlled substance, marijuana," omitting the term "possession." The clerk then asked "Guilty of possession of a controlled substance, marijuana? And this is your verdict, so say you all?" The jury response was "Yes, sir." We hold that the verdict supports the judgment. A jury's pronouncement is not a verdict until it is accepted by the court. *State v. Rhinehart*, 267 N.C. 470, 148 S.E. 2d 651. Since the foreman's initial statement which failed to refer to possession was not accepted without clarification, it was not a verdict. Moreover, contrary to defendant's assertions, the clerk did not improperly suggest a verdict to the jury but rather asked a question. See *Davis v. State*, 273 N.C. 533, 160 S.E. 2d 697; *State v. Martin*, 17 N.C. App. 317, 194 S.E. 2d 60, *cert. den.*, 283 N.C. 259. When the sequence upon which defendant's objection is based is considered in terms of the issue being tried and the evidence, it is apparent that the jury intended to convict the defendant of something. The clerk's inquiry and the jury's response enabled the court to determine precisely what that something was. See *Davis v. State, supra*; *State v. Sears*, 235 N.C. 623, 70 S.E. 2d 907. We also note that defendant declined to exercise his right to poll the jury.

We find no prejudicial error in the trials from which defendants appealed.

No error.

Judges CAMPBELL and MORRIS concur.

State v. Billings

STATE OF NORTH CAROLINA v. TOMMY HENRY BILLINGS

No. 7423SC231

(Filed 5 June 1974)

1. Criminal Law § 154— deficiency in record on appeal — stipulation of jurisdictional facts

Failure of the record on appeal to show jurisdiction in the superior court of misdemeanors is deemed cured where, in response to the appellate court's request for a sufficient record, counsel for the State and for defendant filed a stipulation as to the jurisdictional facts and the accuracy of the stipulation was certified by the clerk of superior court.

2. Criminal Law § 118— misstatement of contentions — omission in review of evidence

Any alleged misstatement of the contentions of a party or omission by the court in its review of the evidence must be called to the court's attention.

3. Constitutional Law § 31; Criminal Law § 98— right to be present at verdict — waiver

Defendant waived his right to be present in the courtroom at the rendition of the verdict by voluntarily absenting himself from the courtroom prior to the time the verdict was returned.

APPEAL by defendant from *Rousseau, Judge*, 24 September 1973 Session of Superior Court held in ALLEGHANY County.

Defendant was convicted of operating a motor vehicle while his operator's license was permanently revoked, careless and reckless driving and failure to stop upon approach of a police vehicle giving an audible signal by siren. The cases were consolidated for judgment and a sentence of two years was imposed.

Attorney General Robert Morgan by James Wallace, Jr., Associate Attorney, for the State.

Finger & Park by Daniel J. Park for defendant appellant.

VAUGHN, Judge.

[1] The record on appeal, as filed in this court, contained nothing to show that defendant was ever tried in the District Court on the charge of driving while his license was permanently revoked. There was nothing in the record to indicate that defendant appealed from the District Court to the Superior Court in any of the cases. There was, therefore, nothing to show that the Superior Court had jurisdiction. When lack of jurisdiction is

State v. Billings

apparent, the Supreme Court will stop the proceedings and arrest judgment. *State v. Guffey*, 283 N.C. 94, 194 S.E. 2d 827. In response, however, to our request for a sufficient record, counsel for the State and defendant have filed a stipulation as to the jurisdictional facts and the accuracy of the stipulation has been certified by the clerk of the Superior Court of Alleghany County. We regard the deficiency in the record cured and consider the case on its merit. See *State v. Willis*, 285 N.C. 195, 204 S.E. 2d 33.

[2] Defendant contends that the judge, in his recapitulation of the evidence, did not repeat evidence elicited on cross-examination. This assignment is without merit. Moreover, any alleged misstatement of the contentions of a party or omission by the court in its review of the evidence must be called to the court's attention. *State v. McClain*, 282 N.C. 396, 193 S.E. 2d 113.

[3] When the jury retired the court took a five or ten minute recess and thereafter proceeded with other matters before the court. In a few minutes the jury came in with its verdict. Defendant's counsel was present. The court heard from counsel for defendant (defendant being present) and then pronounced judgment. Thereafter, defense counsel stated that he had just been advised that defendant was not present when the jury returned in open court. Defendant's motion for arrest of judgment because of the foregoing was denied and that is the subject of his only other assignment of error. If defendant was not in the courtroom when the jury returned, there is nothing in the record to indicate that his absence was other than voluntary. He therefore waived his right to be present at the rendition of the verdict. He was present when sentence was imposed. There is no merit to the assignment of error. *State v. Stockton*, 13 N.C. App. 287, 185 S.E. 2d 459.

No error.

Judges CAMPBELL and MORRIS concur.

Hartness v. Penny

DR. W. R. HARTNESS v. RONALD T. PENNY, ADMINISTRATOR OF THE
ESTATE OF A. C. HARRIS, DECEASED

No. 7411DC352

(Filed 5 June 1974)

**Accounts § 1— action on account — statute of limitations — mailing of
account — account stated — payment by Medicare**

In a physician's action on an account in which defendant pled the statute of limitations as to a major portion of the account, plaintiff's evidence on motion for summary judgment that a true copy of the account had been mailed to defendant's intestate did not show that the account had been converted from an open account to an account stated where there was no showing as to when the account was mailed, and evidence that a payment had been made on the account by Medicare did not show as a matter of law that a payment had been made by the debtor which would toll the statute of limitations; therefore, the trial court erred in granting summary judgment for plaintiff for the entire amount of the account.

APPEAL by defendant from *Lyon, District Court Judge*, 26 November 1973 Session of District Court held in LEE County.

On 28 September 1973, plaintiff sued on an account totaling \$719.20 alleged to be due from defendant's intestate.

Defendant admits a debt of \$42.00 but pleads the statute of limitations as to the other items in the account.

Defendant moved for summary judgment as to all the account except \$42.00. Plaintiff moved for summary judgment and, in support of the motion, filed a copy of the account and an affidavit by his bookkeeper. The copy of the account indicated a balance of \$250.00 in 1965 and showed entries for services to and including 6 March 1971. The last payment by defendant was on 11 September 1968. One entry disclosed a payment on the account by Medicare on 6 May 1970. Included in the affidavit is a statement that a true copy of the account had been mailed to A. C. Harris, defendant's intestate. The date of the alleged mailing is not specified. Harris is alleged to have died on 14 September 1972.

Plaintiff's motion for summary judgment was allowed, and judgment was entered in his favor for \$719.20.

W. W. Seymour by *H. Clinton Cheshire* for plaintiff appellee.

Ronald T. Penny for defendant appellant.

Clemons v. Morris

VAUGHN, Judge.

It was error to grant plaintiff's motion for summary judgment.

Plaintiff's theory is that the mailing of the account to defendant converted the account from an open account to an account stated. At this stage of the proceeding, this contention must fail for there is no showing *when* the account was mailed. It could have been mailed the day before Harris died. For that reason, there can be no presumption that Harris examined the account and accepted it as correct. We also note that the mere entry showing a payment by Medicare on 6 May 1972, would not, standing alone and as a matter of law, constitute a payment by the debtor which would toll the statute of limitations.

The judgment granting plaintiff's motion is reversed, and the case is remanded.

Reversed and remanded.

Judges PARKER and CARSON concur.

VICTOR EUGENE CLEMONS v. SUE ELLEN CLEMONS MORRIS

No. 7421DC358

(Filed 5 June 1974)

Divorce and Alimony § 23— reduction of child support — no change in circumstances

The trial court erred in altering a child support order by reducing the amount of support plaintiff is required to pay where no material change of circumstances was shown, plaintiff's net earnings having increased and the court's finding that plaintiff's expenses for housing will increase when he moves to another state being unsupported by any evidence.

APPEAL by defendant from *Alexander, District Court Judge*, 8 October 1973 Session of District Court held in FORSYTH County.

Defendant appealed from an order reducing the amount plaintiff is required to pay towards the support of a child born to a former marriage of the parties. In an order dated 6 Decem-

State v. Woods

ber 1972, plaintiff was required to pay \$400.00 per month for the support of his 8-year-old son. In the order from which defendant appeals, the support was reduced to \$60.00 per week.

No counsel for plaintiff appellee.

Wilson and Morrow by John F. Morrow for defendant appellant.

VAUGHN, Judge.

The court's findings of fact do not support the conclusion that there has been a material change in the circumstances of parties since the entry of the order of 6 December 1972. Plaintiff's net earnings have increased. The court's finding that plaintiff's expenses for housing will increase when he moves to Florida was not supported by any evidence in the record before us.

It may well be, as the court found, that expenses defendant claims for her child are excessive. There was, nevertheless, no change shown in the needs of the child since the entry of the order of 6 December 1972 from which plaintiff could have appealed.

Because no material change of circumstances has been shown, the order must be reversed.

Reversed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. DON ANTHONY WOODS, JOHNNY WAYNE WILLS, MATTHEW WILBERT WILLS, ROY ARCHIE WILLS

No. 741SC402

(Filed 5 June 1974)

ON *Certiorari* to review the trial before *Copeland, Judge*, 17 September 1973 Session of Superior Court held in CHOWAN County.

This is a criminal action wherein the defendants, Don Anthony Woods, Johnny Wayne Wills, Matthew Wilbert Wills, and

State v. Woods

Roy Archie Wills, were charged in warrants, proper in form, with disorderly conduct. Each of the defendants was found guilty in the District Court and each appealed to the Superior Court for a trial *de novo*. The cases were consolidated for trial and the State presented evidence which tended to establish the following:

On 16 May 1973 at 11:30 a.m. defendant Don Woods, a field secretary for the Southern Christian Leadership Conference, and a number of students of John A. Holmes High School in Edenton, N. C. (including three of the present defendants) approached the principal's office with the desire to discuss an incident involving the high school band director, and also what disciplinary action, if any, would be taken against the students who participated in the "Black Monday stayout." Kenneth L. Stalls, principal of the high school, informed the group that he had been instructed not to discuss these matters; however, he did remain in his office for the next two hours and engaged in discussions with the group about various other problems. At about 1:30 p.m., Stalls told the group that he had other duties to perform, and when they insisted on remaining in his office, the principal locked his desk and safe and left the room. During the course of events the principal had notified the superintendent of the Edenton-Chowan Schools, Dr. Edwin L. West, of the activities of the group, and Dr. West testified that he made several visits to the high school on the day in question. On at least two occasions during these visits Dr. West requested the group to vacate the premises, but his requests were ignored. At 7:00 p.m., after further requests to disperse were made by the Captain of the Edenton Police Force and again by Dr. West, the police arrested the members of the group, including the present defendants. Further evidence introduced by the State tended to show that members of the group had damaged furniture and windows in the principal's office, and had placed some marks on the wall of a bathroom adjacent to the principal's office.

The defendants offered evidence which differed in material part from that offered by the State only in that the defendants denied doing any damage to the principal's office or the adjacent bathroom, and in that the defendants testified that at no time did Dr. West ask, order, or command the group to leave the building.

State v. Burgess

Upon completion of the presentation of the evidence, the jury returned verdicts of guilty as to all four defendants; and from judgments imposed thereon, the defendants appealed.

Attorney General Robert Morgan by Assistant Attorney General William F. Briley for the State.

Paul, Keenan & Rowan by Jerry Paul for defendant appellants.

HEDRICK, Judge.

We have carefully reviewed the assignments of error brought forward and argued by defendants and find them to be without merit. The defendants were afforded a fair trial free from prejudicial error.

No error.

Judge BRITT concurs.

Judge CARSON concurs in the result.

STATE OF NORTH CAROLINA v. GEORGE THOMAS BURGESS

No. 7410SC298

(Filed 5 June 1974)

APPEAL by defendant from *Winner, Special Judge*, 7 November 1973 Session, Superior Court, WAKE County. Heard in the Court of Appeals 19 April 1974.

Defendant was charged with felonious breaking and entering. At trial, he was represented by counsel appointed by the court, entered a plea of "not guilty," was convicted by the jury, and appealed from judgment entered on the verdict.

Attorney General Morgan, by Assistant Attorney General Chalmers, for the State.

J. Larkin Pahl for defendant appellant.

State v. Huffman

MORRIS, Judge.

The evidence for the State tended to show that at about 11:45 p.m., 31 August 1973, the glass partition on the door of the southeast side of the Central Motor Pool at 135 Morgan Street, in Raleigh, was found to have been broken and the door unlocked. All interior lights had been turned on. As the officers entered the building, defendant came out of the offices holding in his arms two cases of Auto-Lite spark plugs and one case of Eveready flashlights. Defendant was arrested for breaking and entering and advised of his rights. A search of defendant revealed that he had on his person, among other things, two sets of keys belonging to two North Carolina State cars. In the trunk of one of these cars, the lid to which was up, officers found one case of Hercules flashlight batteries and three cases of Auto-Lite spark plugs.

The defendant elected not to testify nor put on any evidence, thus giving his counsel the closing jury argument. His motion for nonsuit was denied. His counsel conducted a vigorous cross-examination of all State's witnesses. Defendant was adequately represented. The judge's charge was without prejudicial error.

It appears completely obvious from the record that defendant had a fair and impartial trial, represented by competent counsel, on a valid charge. No prejudicial error appears.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES CLARENCE HUFFMAN

No. 746SC232

(Filed 5 June 1974)

APPEAL by defendant from *Rouse, Judge*, 22 October 1973 Session of Superior Court held in NORTHAMPTON County.

Attorney General Robert Morgan by Charles M. Hensey and Robert G. Webb, Assistant Attorneys General, for the State.

Bruce C. Johnson for defendant appellant.

State v. Clark

VAUGHN, Judge.

Defendant was convicted of felonious attempted escape, and sentence within lawful limits was imposed. We have considered the assignments of error brought forward and argued by diligent court appointed counsel. We find no error.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. DUPREE CLARK

No. 741SC403

(Filed 19 June 1974)

1. Criminal Law § 161— assignments of error — one question of law

An assignment of error which attempts to present more than one question of law is broadside and ineffective.

2. Criminal Law § 161— assignment of error — denial of three motions — alleged denial of constitutional rights — more than one question of law

An assertion that the denial of three different motions violated defendant's First and Fourteenth Amendment rights does not mean that the same question of law is presented by the denial of each motion and that exceptions to such denials may be grouped under the same assignment of error.

3. Indictment and Warrant § 6— affidavit for warrant — personal knowledge of affiant

Affidavit for an arrest warrant shows that it was made on the personal knowledge of the sheriff-affiant where the sheriff stated under oath that defendant failed and refused to disperse when the sheriff commanded defendant to disperse.

4. Disorderly Conduct and Public Drunkenness § 2— failure to disperse — constitutionality of portion of disorderly conduct statute

In a prosecution under G.S. 14-288.5 for failing to comply with a command to disperse by a law enforcement officer who reasonably believed that disorderly conduct by an assemblage of three or more persons was occurring, the constitutionality of section (a)(2) of the disorderly conduct statute, G.S. 14-288.4 as amended in 1971, was not presented where the trial judge restricted the jury's consideration of what constituted disorderly conduct to sections (a)(3), (a)(4) and (a)(5)b. of that statute.

State v. Clark

5. **Disorderly Conduct and Public Drunkenness § 2— refusal to disperse — warrant need not specify disorderly conduct**

It is not necessary for a warrant drawn under G.S. 14-288.5 to specify the disorderly conduct by an assemblage of three or more persons that the officer reasonably believed was occurring.

6. **Criminal Law §§ 18, 134— erroneous judgment in district court — trial de novo in superior court**

Even if the district court judgment was erroneous in reciting that defendant was found guilty of a violation of G.S. 14-288.4 instead of G.S. 14-288.5, defendant was not prejudiced by failure of the superior court to remand the case to the district court for a proper judgment where defendant received a trial *de novo* in the superior court.

7. **Constitutional Law § 30— appeal to superior court — belated motion for transcript of district court trial**

In an appeal to superior court from conviction in the district court, the superior court did not err in the denial of defendant's motion for a free copy of the transcript of the trial in the district court where defendant made no request for a transcript until the case was called for trial in the superior court, no transcript had been prepared by the court reporter, and defendant had had ample opportunity to seek a transcript prior to the time the case was called for trial in the superior court.

8. **Disorderly Conduct and Public Drunkenness § 2— failure to disperse — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for failing to comply with a lawful command to disperse in violation of G.S. 14-288.5 where it tended to show that defendant was one of a group of 30 to 40 people who entered the office of a school superintendent's secretary at 11:30 a.m. and demanded that the group be allowed to talk with the superintendent about the reemployment of a specified person, that the superintendent stated he would meet with a committee from the group but not all of them, that half of the group entered the superintendent's office, that their conduct consisted of singing, shouting, stomping of feet and prostration of bodies on the floors and desks, that the sheriff requested the group to leave on several occasions, and that the group was arrested at 6:30 p.m. after they refused to leave the superintendent's office.

9. **Jury § 6— examination of prospective jurors — presence at meetings with defendant**

In a prosecution for failing to comply with a lawful command to disperse, the trial court did not err in permitting the solicitor to ask prospective jurors whether they had attended meetings at a certain church while defendant was at the church.

10. **Criminal Law § 102— jury argument of solicitor**

The solicitor's argument to the jury did not exceed reasonable bounds in a prosecution for failing to comply with a lawful command to disperse.

State v. Clark

11. Criminal Law § 163— exceptions to charge

Exceptions to the charge are ineffective where they fail to identify the portions of the charge which defendant considers erroneous.

APPEAL by defendant from *Copeland, Judge*, 12 September 1973 Session of Superior Court held in CHOWAN County. Argued in the Court of Appeals 18 April 1974.

Defendant was charged in a warrant, drawn under G.S. 14-288.5, with unlawfully and wilfully failing and refusing to disperse when commanded to do so by Sheriff Troy Toppin, a law enforcement officer responsible for keeping the peace, when said officer reasonably believed that disorderly conduct, by an assemblage of three or more persons, was occurring.

Defendant was tried in District Court and found guilty by the judge of "Disorderly Conduct by Failure to Disperse which is a violation of G.S. 14-288.4 and of the grade of misdemeanor." Upon appeal to Superior Court, defendant was tried de novo by jury upon the original warrant and found guilty of "Failure to Disperse as charged in the Warrant."

The State's evidence tends to show the following:

On 16 May 1973, at approximately 11:30 a.m., Mr. Edwin L. West, Jr., Superintendent of the Edenton-Chowan School System, heard a stomping noise on the stairs leading to his office in the county office building. Thereafter, the noise in his outer office disturbed him, and, upon investigation, he found 30 or 40 people in his secretary's office. The ages of members of the group ranged from nine to thirty-five years old.

The defendant informed West that the group had come to talk with West concerning the reemployment of Mr. Richard Satterfield. West advised defendant that he would meet with a committee from the group, but not all of them. Defendant then delivered an ultimatum that West would see all of the group or none of them. West then testified:

"I asked him to leave because we were trying to carry on normal office operations and he said they were going to stay there until they got arrested. When he said that the 30 or 40 people were in the room and my secretary. The rest of the group was listening."

West then returned to his private office. A few minutes later, approximately half of the group entered West's private

State v. Clark

office. The conduct of the group within West's office was the same as that of the other half of the group, consisting of shouting, singing, stomping of feet, and prostration of bodies on the floors and desks of the offices. Finding it impossible to carry on any business activity, West sent his employees home at 1:30 p.m.

West called Sheriff Toppin immediately after the group entered his offices. West left the office shortly thereafter and returned at 3:00 p.m. and later at 6:45 p.m. West requested defendant and the group to leave the offices both times, informing the group at 3:00 p.m. that the offices normally closed at 4:30 p.m.

Troy Toppin, Sheriff of Chowan County, entered West's offices after receiving a call from West. Toppin advised the group that a committee of three or four could talk with West and that the remainder would have to remain quiet or leave the premises.

Defendant informed Toppin that his intent was "to lead the group to be heard," that he did not have a "violent intent," and that "they would not leave until they were heard."

Toppin checked on the group periodically during the day after stationing a deputy outside the door to the office suite. Members of the group would occupy the various offices while other members would go to a nearby drug store to get something to eat and return. At 3:00 p.m., Toppin advised the group that the building is customarily locked at 5:00 p.m., and that he wanted the group out of the building at that time.

At 6:30 p.m., Toppin accompanied West to the offices where West requested the group to leave or they would be placed under arrest and removed from the offices. Toppin then requested the group to leave two or three times, and placed them under arrest when none left. The group obediently marched out of the building in single file to the jail where they were incarcerated.

The defendant offered no evidence. From the verdict of guilty and judgment of imprisonment for a period of six months, defendant appealed.

Attorney General Morgan, by Assistant Attorney General Melvin, for the State.

Paul, Keenan & Rowan, by Jerry Paul, for the defendant.

State v. Clark

BROCK, Chief Judge.

Defendant has done considerable violence to very fundamental rules of appellate practice in North Carolina. He has grouped, under one assignment of error, exceptions which present several questions of law. The requirement for grouping exceptions is designed to have all exceptions which present the same single question of law grouped together and assigned as error. "It is the grouping of exceptions (whether one or more) presenting the same single question of law, which constitutes an assignment of error." *Nye v. Development Company*, 10 N.C. App. 676, 179 S.E. 2d 795. Explanation of the function of assignments of error has been stated time and again. See, *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534; *State v. Wilson*, 263 N.C. 533, 139 S.E. 2d 736; *Conrad v. Conrad*, 252 N.C. 412, 113 S.E. 2d 912, *State v. Atkins*, 242 N.C. 294, 87 S.E. 2d 507; *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785; *State v. Dickens*, 11 N.C. App. 392, 181 S.E. 2d 727; *State v. Patton*, 5 N.C. App. 501, 168 S.E. 2d 500; and *State v. Conyers*, 2 N.C. App. 637, 163 S.E. 2d 657.

[1, 2] For example, defendant has grouped under his first assignment of error his exceptions to (1) denial of his motion to quash the warrant, (2) denial of his motion to remand the case to the District Court or dismiss, and (3) denial of his motion for a free transcript of his trial in the District Court. Defendant undertakes to group these three assignments of error together upon his assertion that the rulings of the trial court violated defendant's First and Fourteenth Amendment rights. Nevertheless, it takes only a passing glance to determine that each of these three exceptions involves different questions of law. Lumping them under broad constitutional principles does not suffice. Where one assignment of error attempts to present more than one question of law, it is broadside and ineffective. *State v. Blackwell, supra*. The fact that defendant asserts that the denial of his three motions violates his First and Fourteenth Amendment rights does not mean that they present the same question of law for resolution.

Under another assignment of error, defendant groups exceptions numbers 46 through 55 and for his assignment of error states: "The trial court erred in its instructions to the jury in that the trial court (1) misstated the law; (2) expressed opinions to the jury; and (3) inaccurately summarized the evi-

State v. Clark

dence for the State." Again, it is clear at a glance that these exceptions do not present the same question of law.

We will not belabor further the impropriety of defendant's grouping of exceptions (assignments of error). Suffice it to say, it appears that many exceptions have been abandoned, and that others fail to clarify what question defendant seeks to raise. We will proceed as best we can, in the light of defendant's cumbersome presentation of the record on appeal, to discuss questions which have been identified and pursued on appeal.

[3] Defendant argues that the warrant should have been quashed because no probable cause for arrest is shown in the affidavit executed in support of the warrant for arrest. He argues that the affiant must state that he is speaking from personal knowledge, or must specify the source of his knowledge. The affidavit reads as follows:

"The undersigned, Sheriff Troy Toppin, being duly sworn, complains and says that at and in the County named above and on or about the 16th day of May, 1973, the defendant named above did unlawfully, wilfully, fail and refuse to disperse when commanded to do so by a law enforcement officer responsible for keeping the peace, to wit: Sheriff Troy Toppin, when said officer reasonably believed that disorderly conduct as defined by G.S. 14-288.4 was occurring by the assemblage of three or more persons in the Chowan County Office Building."

It seems ludicrous to suggest that the affidavit does not clearly show that it was made on the personal knowledge of Sheriff Toppin. The sheriff states under oath that defendant failed and refused to disperse when he, the sheriff, commanded defendant to disperse.

Defendant further argues that the warrant should have been quashed because G.S. 14-288.4 and G.S. 14-288.5 are unconstitutional. The only argument advanced by defendant with respect to G.S. 14-288.5 is that by its terms it must rely upon the validity of G.S. 14-288.4. Therefore, defendant relies upon his assertion that G.S. 14-288.4 is unconstitutional because it is vague and overbroad.

At the outset, defendant cites and argues the holding of *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 that portions of G.S. 14-288.4 are unconstitutional. Defendant has misplaced

State v. Clark

his reliance. *Summrell* was decided under G.S. 14-288.4 as adopted in 1969. The statute was amended by Chapter 668 of the 1971 Session Laws, effective upon its ratification on 25 June 1971. The offenses charged in *Summrell* were committed on 6 July 1970 and he was tried in Superior Court during the 10 May 1971 Session, all before the enactment of G.S. 14-288.4 as it read at the time of the offense alleged in the case, *sub judice*. Additionally, in *Summrell*, the defendant was charged and convicted of the offense of disorderly conduct as defined by G.S. 14-288.4 (1969). Defendant in the present case is not charged with the offense of disorderly conduct; he is charged and was convicted in Superior Court, of the offense of failing to comply with a lawful command to disperse in violation of G.S. 14-288.5. The offense of disorderly conduct as proscribed by G.S. 14-288.4 and the offense of failing to comply with a lawful command to disperse as proscribed by G.S. 14-288.5 are not the same. Defendant's argument is wide of the mark.

[4] Defendant also argues that section (a) (2) of G.S. 14-288.4, as amended in 1971, is unconstitutionally vague and overbroad. This argument has no application to the present case because the trial judge restricted the jury's consideration of what constituted disorderly conduct to sections (a) (3), (a) (4), and (a) (5) b. of G.S. 14-288.4 (1971). Defendant advances no argument that these sections are unconstitutional. The statute is severable. "If any word, clause, sentence, paragraph, section, or other part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof." Sec. 3, Chapter 668, 1971 Session Laws. Therefore, a determination of the constitutionality of G.S. 14-288.4 (a) (2) is not necessary for a disposition of this appeal, and we make no determination.

[5] We recognize that defendant argues that G.S. 14-288.4 must be considered in its entirety. He argues that under the warrant in question, defendant is unable to determine what section of G.S. 14-288.4 he is charged with violating so as to be in violation of G.S. 14-288.5. This argument has no merit. Defendant was charged and convicted in Superior Court of the offense of failing to comply with a lawful command to disperse. It is not necessary for a warrant drawn under G.S. 14-288.5 to specify the disorderly conduct by an assemblage of three or more persons the officer reasonably believes is occurring. Under G.S. 14-288.5, the failure to disperse when commanded by an officer would

State v. Clark

be an offense where no disorderly conduct was occurring so long as it is shown on trial that the officer had reasonable grounds to believe that disorderly conduct was occurring by an assemblage of three or more persons.

G.S. 14-288.5(a) and (b), under which defendant is charged, reads as follows:

“(a) Any law-enforcement officer or public official responsible for keeping the peace may issue a command to disperse in accordance with this section if he reasonably believes that a riot, or disorderly conduct by an assemblage of three or more persons, is occurring. The command to disperse shall be given in a manner reasonably calculated to be communicated to the assemblage.

“(b) Any person who fails to comply with a lawful command to disperse is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars (\$500.00) or imprisonment for not more than six months.”

Although the warrant in this case contains elaboration in addition to the statute (G.S. 14-288.5), it nevertheless charges in the words of the statute. The affidavit, stripped of elaboration, reads:

“... [O]n or about the 16th day of May, 1973, the defendant named above did ... wilfully fail ... to disperse when commanded to do so by a law enforcement officer responsible for keeping the peace, ... when said officer reasonably believed that disorderly conduct ... was occurring by the assemblage of three or more persons ...”.

If the defendant desired more definite information about the particular disorderly conduct the officer reasonably believed was occurring, he had the right to request a bill of particulars. In the absence of such request, he has no cause to complain.

In *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652, defendant urged a fatal variance between indictment and proof. The indictment charged murder in the following words:

“THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, That Johnny Frazier late of the County of Mecklenburg on the 18 day of June 1970, with force and arms, at and in the said County, feloniously, wilfully, and of his malice aforethought, did kill and murder Carla Jean

State v. Clark

Underwood contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.”

Upon trial, the evidence disclosed a homicide committed in the perpetration of a robbery. In *Frazier*, the Court held that the indictment was proper in form and further stated:

“The indictment is sufficient in form to allege murder and support a conviction of murder in the first degree. G.S. 15-144; *State v. Haynes*, 276 N.C. 150, 171 S.E. 2d 435. G.S. 14-17 provides that a murder committed in the perpetration of a robbery or other felony shall be deemed murder in the first degree. It is not required that the indictment allege that the murder was so committed in order that it be sufficient to support a verdict of murder in the first degree. *State v. Haynes*, *supra*. In *State v. Mays*, 225 N.C. 486, 489, 35 S.E. 2d 494, this Court, speaking through Justice Barnhill, later Chief Justice, said:

“The bill of indictment charges the capital felony of murder in the language prescribed by statute. G.S., 15-144. It contains every averment necessary to be made. *S. v. Arnold*, 107 N.C. 861; *S. v. R. R.*, 125 N.C., 666. Proof that the murder was committed in the perpetration of a felony constitutes no variance between *allegata* and *probata*. *S. v. Fogleman*, 204 N.C., 401, 168 S.E., 536.

If the defendant desired more definite information, he had the right to request a bill of particulars, in the absence of which he had no cause to complain.’”

We note that by the time defendant was placed on trial in Superior Court he had already been tried in District Court where defendant was fully apprised, or through cross-examination had the opportunity to be fully apprised, of the particular disorderly conduct the officer believed was occurring.

[6] Defendant argues that the case should have been remanded to the District Court for a proper judgment because the District Court judgment recited that defendant was found guilty of a violation of G.S. 14-288.4 instead of G.S. 14-288.5 as he was charged. Conceding, without deciding, that the District Court judgment is erroneous, nevertheless, defendant appealed to Superior Court where his trial was *de novo*. The purpose of the

State v. Clark

appeal was to obtain a new trial free from the errors defendant may have felt were committed in District Court. He received a new trial from beginning to end, on the charge contained in the warrant, on both law and facts, disregarding completely the plea, trial, verdict and judgment in the District Court. A remand to the District Court would accomplish nothing but delay. Defendant has failed to show prejudice from the refusal to remand to the District Court.

[7] Defendant argues that it was prejudicial error for the Superior Court to deny his motion for a free copy of the transcript of the trial in District Court. During defendant's trial in District Court, the regular Court Reporter recorded the proceedings. However, although more than a month passed between the time defendant was tried in District Court and the time he was tried in Superior Court, the defendant made no request for transcript of the District Court trial until the date defendant's case was called for trial in the Superior Court. The Court Reporter did not prepare a transcription of the proceedings in District Court because no one requested a transcript. Defendant's counsel, the District Attorney, and the Superior Court Judge held a pre-trial conference in this case on 22 August 1973. The case was originally set for trial on 5 September 1973 and defense counsel appeared and consented to a continuance until 11 September 1973. Therefore, defendant had ample opportunity to seek a transcript prior to the time the case was called for trial. Defendant has failed to show denial of a timely request for a copy of the transcript of the proceedings in District Court.

Exception numbers 5 through 43, entered to rulings upon admissions and exclusions of evidence, are grouped under Assignment of Error No. II. They present a variety of questions of law. The assignment of error is broadside and of no effect. *State v. Blackwell, supra*. Also, the assignment of error is deemed abandoned for failure of defendant to support it by reason, argument, or citation of authority. Rule 28, Rules of Practice in the Court of Appeals.

[8] Defendant argues that the trial judge committed error in the denial of defendant's motions to dismiss at the close of the evidence. Upon this question, we merely hold that, in our opinion, the evidence was sufficient to require submission of the case to the jury.

[9] Defendant assigns as error that the trial court permitted improper questions by the State to prospective jurors. The

Power Co. v. City of High Point

District Attorney inquired whether any member of the jury had attended meetings at Gale Street Baptist Church while defendant was at the church. The trial judge overruled defendant's objection to the question. No prejudice to defendant or abuse of discretion by the trial judge has been shown, or even argued, by defendant.

[10] Defendant assigns as error that the trial judge permitted improper argument to the jury by the District Attorney. We fail to see how the argument objected to by defendant exceeded reasonable bounds. The trial judge overruled defendant's objection. In doing so, the trial judge was correct.

[11] Defendant's final assignment of error is to the trial judge's instructions to the jury in that he (1) misstated the law, (2) expressed opinions to the jury, and (3) inaccurately summarized the evidence for the State. Under this assignment of error defendant groups exceptions 46 through 55. From the assignment of error itself, it is obvious that it presents more than one single question of law. It is therefore broadside and ineffective. *State v. Blackwell, supra*. Also, the exceptions themselves fail to identify the portion of the instructions to the jury that defendant considers erroneous. It appears that the instructions constituted a fair explanation to the jury of the appropriate principles of law to be applied to the evidence.

No error.

Judges PARKER and BAILEY concur.

DUKE POWER COMPANY AND HALL PRINTING COMPANY v. CITY OF HIGH POINT AND PAUL CLAPP, MAYOR OF THE CITY OF HIGH POINT, RACHEL GRAY, O. ARTHUR KIRKMAN, ARNOLD KOONCE, JR., ROY B. CULLER, SAMUEL BURFORD, FRANK WOOD, ROBERT O. WELLS AND JAMES L. PEARCE, JR., MEMBERS OF CITY COUNCIL OF HIGH POINT, NORTH CAROLINA, LONNIE C. WILLIAMS, JR., DIRECTOR OF PUBLIC UTILITIES, CITY OF HIGH POINT, AND HAROLD CHEEK, CITY MANAGER, CITY OF HIGH POINT

No. 7418SC428

(Filed 19 June 1974)

1. Utilities Commission § 4— jurisdiction over power company

The N. C. Utilities Commission has general and supervisory jurisdiction over the retail electric rates and service charged and rendered by plaintiff power company. G.S. 62-1, *et seq.*

Power Co. v. City of High Point

2. Utilities Commission § 4; Electricity § 2; Municipal Corporations § 4—public utility operating in city—control by Utilities Commission

Plaintiff power company may not abandon service to any customer without the consent of the customer or authorization of the Utilities Commission; and the power of defendant municipality to grant franchises to public utilities for the use of its streets and to provide service to its citizens must yield to the paramount right of the State to regulate, through the Utilities Commission, public utilities even when they are operated within the corporate boundaries of a municipality. G.S. 62-118; G.S. 62-38.

3. Municipal Corporations § 1—powers of city given by State

A city or other municipal corporation is a creature of the State and has no power except that given by the State.

4. Electricity § 2; Municipal Corporations § 23; Utilities Commission § 4—franchise for power company—operation of power company by city—jurisdiction of Utilities Commission

A city in this State has authority to grant, upon reasonable terms and for a period of not more than sixty years, a franchise for the operation of an electric power transmission or distribution system within the city, and a city also has the power to operate its own electric power transmission or distribution system, which system is not subject to the control and jurisdiction of the Utilities Commission. G.S. 160A-319; G.S. 160A-311; G.S. 62-3(23)d.

5. Electricity § 2; Municipal Corporations § 4; Utilities Commission § 4—substitution of city power for that of public utility—injunction proper

The trial court properly granted plaintiffs' motion for summary judgment in an action to enjoin defendant city from disconnecting plaintiff utility company's lines serving plaintiff printing company, from connecting the city's power lines to the printing company, and from serving the printing company absent a request by the printing company for service from the city or an order of the Utilities Commission authorizing plaintiff utility company to abandon service to the printing company.

APPEAL by defendants from *Exum, Judge*, 7 January 1974 Session of Superior Court held in GUILFORD County.

This is a civil action instituted by Duke Power Company (Duke) and Hall Printing Company (Hall) on 16 February 1973, asking that defendants, the City of High Point, its officials and employees, be enjoined from disconnecting Duke's power lines serving Hall, from connecting High Point's lines to Hall, and from serving Hall absent a request by Hall for service from High Point or an order of the North Carolina Utilities Commission authorizing Duke to abandon service to Hall. On the same date, the court issued a temporary restraining order, and, following a hearing, on 30 March 1973, entered a preliminary injunction.

Power Co. v. City of High Point

tion as requested by plaintiffs. On 12 March 1973, defendants filed their answer.

On 17 August 1973, plaintiffs moved for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, or, in the alternative, summary judgment pursuant to Rule 56. On 21 August 1973, defendants filed a "motion for pretrial conference and order limiting issues for trial" and at the same time filed, as an exhibit to the motion, a document designated as "Plan of Acquisition of Duke Power Company's Electrical Customers and Facilities by the City of High Point June 21, 1973." On 24 August 1973, pursuant to Rule 56, defendants filed motion for summary judgment "in the defendants' favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law."

Following a hearing, the court filed on 8 January 1974 the following judgment:

"This cause came on for hearing in chambers before the Honorable James G. Exum, Jr., Resident Judge of the Superior Court, upon plaintiffs' 'Motion for Judgment on the Pleadings or Summary Judgment' filed August 17, 1973; defendants' 'Motion for Pretrial Conference and Order Limiting Issues for Trial' filed August 21, 1973; and defendants' 'Motion for Summary Judgment' filed August 24, 1973. The parties entered into a written stipulation providing for waiver of further notice of hearing as to said motions, for leave to file briefs and reply briefs, and agreement that the undersigned Resident Judge could hear and determine said motions out of term and in chambers.

"Based on the verified complaint, as amended, and the defendants' answer thereto, the court finds and concludes that there is no genuine issue as to any material fact; that only questions of law on the indisputable facts are in controversy; and that this case is therefore properly before the court for a determination on the merits.

"Based upon the verified complaint, as amended, the defendants' answer thereto, as well as such affidavits and other matters as have been submitted and being fully advised in the premises, the court makes the following

Power Co. v. City of High Point

"FINDINGS OF FACT"

"1. Plaintiff Duke Power Company ('Duke'), a North Carolina corporation, with general offices located at 422 South Church Street, Charlotte, North Carolina, is a public utility engaged in the generation, transmission and distribution of electric power and energy for sale to the general public in the States of North Carolina and South Carolina.

"2. Plaintiff Hall Printing Company ('Hall'), a North Carolina corporation, is engaged in the business of commercial printing and lithography at 135 South Hamilton Street, High Point, North Carolina.

"3. The defendant City of High Point ('City'), is a municipal corporation organized and existing under the laws of the State of North Carolina. The City in its proprietary function furnishes electric service to citizens and residents of the City through a distribution system owned by it.

"4. Prior to February 9, 1969, Duke rendered electric service to certain customers in the City, pursuant to a franchise issued by the City to John Leddy and his assigns dated February 9, 1909, and thereafter assigned to Duke. Said franchise expired on February 9, 1969, and was not renewed.

"5. In March of 1971, the City advised Duke by letter (Complaint, Exhibit A) that Duke would not be allowed to serve any new customers within the City and that the City intended 'to eventually serve all electric customers within the City limits.' By letter dated January 3, 1973 (Comp'laint, Exhibit B), the City advised that it intended to serve certain customers in specified areas of the City and that Duke must discontinue serving such customers in the named areas, one of said customers being Hall. Said letter further advised Duke that its wires in the designated areas 'were to be removed without permission to relocate them.'

"6. Duke has been furnishing retail electric service to the premises of Hall for at least the past fifty years. Over the years Duke and Hall have entered into contracts for such electric service, the latest contract being dated October 30, 1973 (Complaint, Exhibit C), under which Duke is presently furnishing retail electric service for power to Hall on rate schedule GA, said rate schedule being on file

Power Co. v. City of High Point

with and approved by the North Carolina Utilities Commission.

"7. By letter of February 14, 1973 (Complaint, Exhibit D), the City advised Duke that the City would commence furnishing electric service to Hall as of February 17, 1973, and that Duke's electric service to Hall 'must be discontinued.' The City proceeded to accomplish same by installing all wires and associated equipment necessary to furnish electric service for power to Hall. Additionally, the City, through its agent, advised Hall or its agents that if Hall did not accept the City's electric service that Hall would have no electric service for power because the City intended in any event to cut off Duke's electric service to Hall, thereby depriving Hall of any source of electric power and supply, whatsoever.

"8. Hall desires to continue its contract for electric service with Duke (Complaint, Exhibit C) in full force and effect and does not desire that the City furnish electric service to its premises for power purposes because such service and the rates charged therefor are not regulated and are subject to change at the will of the City. The North Carolina Utilities Commission has not authorized Duke to abandon electric service to the plaintiff Hall.

"9. By letter dated February 14, 1973 (Complaint, Exhibit E), Hall advised the City that it had a contract with Duke and that it desired that such contract remain in full force and effect and further advised the City that it should refrain from entering Hall's premises in connection with the furnishing of electric service now being furnished by Duke or the discontinuance of such service.

"10. On March 30, 1973, this court entered an order granting plaintiffs' motion for preliminary injunction pending a final determination of this case on the merits.

"11. On August 21, 1973, the defendants filed a 'Motion for Pretrial Conference and Order Limiting Issues for Trial' which included a document entitled 'Plan of Acquisition of Duke Power Company's Electrical Customers and Facilities by the City of High Point, June 21, 1973.' Under said 'Plan,' the City has unilaterally undertaken to determine the method and sequence by which it shall take over all of Duke's customers and purchase, at the City's option,

Power Co. v. City of High Point

certain of Duke's facilities providing electric service to such customers over a three-year period.

"Based on the foregoing FINDINGS OF FACT, together with briefs and arguments by counsel for plaintiffs and defendants, the court makes the following

"CONCLUSIONS OF LAW

"A. The North Carolina Utilities Commission has general and supervisory jurisdiction over the retail electric rates and service of Duke Power Company pursuant to the North Carolina Public Utilities Act, N.C.G.S. 62-1, et seq.

"B. Duke may not abandon service to any customer without the consent of such customer or authorization of the North Carolina Utilities Commission pursuant to G.S. 62-118. The protection afforded utility customers by G.S. 62-118 is extended by G.S. 62-138 (sic) to those, like Hall, who are located within municipal limits as well as those without such limits. G.S. 62-38 grants the North Carolina Utilities Commission 'the same power and authority to regulate the operation of privately owned public utilities within municipalities as it has to regulate such public utilities operating outside of municipalities.'

"C. The power of a municipality, such as the City of High Point, to grant franchises or permits to public utilities for the use of its streets must yield to the paramount right of the State of North Carolina to regulate public utilities, such as Duke, through the North Carolina Utilities Commission even though such public utilities are operating within the corporate boundaries of a municipality. Accordingly, this court has no jurisdiction to approve the 'Plan of Acquisition of Duke Power Company's Electrical Customers and Facilities by the City of High Point, June 21, 1973.' Approval of said 'Plan' must be sought in a proceeding properly brought before the North Carolina Utilities Commission to determine whether it meets the test of public convenience and necessity as required by N.C.G.S. 62-118.

"D. Unless the defendants are enjoined from performing the acts and conduct as set forth in paragraphs 7 and 11, above, irreparable harm, damage, and injury will be done to the plaintiff Hall in that such acts and conduct will deprive Hall of its LEGAL RIGHTS afforded by the public utility laws of the State of North Carolina, particularly

Power Co. v. City of High Point

N.C.G.S. 62-118, and Hall would be without electric service for power for an undetermined period of time, and for all of which plaintiff Hall has no adequate remedy at law.

“E. Unless the defendants are enjoined from performing the act and conduct as set forth in paragraph (sic) 7 and 11, above, irreparable harm, damage and injury will be done to the plaintiff Duke Power Company in that such acts and conduct would force Duke to violate its statutorily imposed public utility obligation not to abandon electric service to its customers without authority from the North Carolina Utilities Commission to do so upon a finding that public convenience and necessity require such abandonment (N.C.G.S. 62-118), and for all of which plaintiff Duke Power Company has no adequate remedy at law.

“F. The City’s ‘Plan’ to take over Duke’s customers and certain of its facilities serving those customers is a matter substantially affecting the public interest and unless the defendants are enjoined from performing the acts and conduct as set forth in paragraphs 7 and 11, above, they will begin serving Duke’s customers within the corporate boundaries of the City without any determination as of whether or not such action is in the interest of the general public, which action will result in irreparable harm, damage and injury to the general public, including plaintiffs herein, and for which there is no adequate remedy at law. On the other hand, the City has an adequate remedy at law in that under N.C.G.S. 62-136(b) the City has the RIGHT to institute a proceeding before the North Carolina Utilities Commission to determine whether or not the City’s ‘Plan’ meets the test of public convenience and necessity as required by N.C.G.S. 62-118.

“G. The plaintiffs’ motion for summary judgment should be granted.

“Now, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

“1. That defendants, their agents, servants, and employees, and all other persons in active concert with them be, and each of them is, hereby permanently restrained and enjoined from discontinuing Duke Power Company’s electric service to Hall Printing Company by cutting and disconnecting the wires and associated equipment of Duke

Power Co. v. City of High Point

Power Company now located on the premises of Hall Printing Company, 135 South Hamilton Street, High Point, North Carolina; from attaching the City's wires and associated equipment to said premises thereby DISPLACING Duke's wires and equipment; from entering upon the premises of Hall in connection with furnishing of or discontinuance of electric service not now being furnished by the City unless and until Hall consents to the discontinuance of Duke's electric service or the North Carolina Utilities Commission authorizes Duke to abandon service to Hall as required by N.C.G.S. 62-118.

"2. (Has been deleted and crossed out and initialed 'JE.')

"3. The acts which any person as aforesaid are hereby permanently enjoined and restrained from doing, they and each of them likewise are hereby enjoined and restrained from enforcing, executing and administering, aiding or procuring or causing them to be done.

"4. That the \$5,000 bond heretofore given by plaintiffs upon the issuance of the preliminary injunction shall be returned to plaintiffs and the costs of this action shall be taxed against the defendants.

"Signed and ordered entered this 7th day of January 1974.

"s/ JAMES G. EXUM, JR.

"Resident Superior Court Judge"

Defendants appealed.

Tally & Tally, by J. O. Tally, Jr., and James D. Garrison, and Knox Walker for defendant appellant.

Morgan, Byerly, Post & Herring, by W. B. Byerly, Jr., and William H. Grigg, by George W. Ferguson, Jr., for plaintiff appellees.

BRITT, Judge.

Did the court err in the entry of the judgment? Except as hereinafter set forth, we hold that it did not.

Regarding the facts set forth in the judgment, we call attention to paragraph 11 and defendants' document entitled "Plan

Power Co. v. City of High Point

of Acquisition of Duke Power Company's Electrical Consumers and Facilities by the City of High Point, June 21, 1973." Considering the pleadings in this case, we do not think the document referred to had any standing in the proceedings, and the court should not have set forth any facts predicated on it. Defendants go so far as to ask the court to approve the plan proposed in the document, when there is no reference in the pleadings to it. In their answer, defendants asked for no affirmative relief, only that plaintiffs be denied relief and that the action be dismissed. In fact, the document was filed more than five months after the answer was filed and four days after plaintiffs filed their motion for judgment on the pleadings or summary judgment.

With respect to the conclusions of law made by the court, we will discuss them in the order set forth in the judgment.

[1] A. It is clear that the North Carolina Utilities Commission has general and supervisory jurisdiction over the retail electric rates and service charged and rendered by Duke. G.S. 62-1, et seq. It appears that defendants do not question this conclusion.

[2] B and C. We agree that Duke may not abandon service to any customer, (subject, of course, to the customer paying his bill, etc.), without the consent of the customer or authorization of the Utilities Commission; and that the power of a municipality to grant franchises to public utilities for the use of its streets and to provide service to its citizens, must yield to the paramount right of the State to regulate, through the Utilities Commission, public utilities even when they are operated within the corporate boundaries of a municipality.

G.S. 62-118 provides in pertinent part: "Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, after petition, notice, and hearing, to authorize by order any public utility to abandon or reduce such service."

G.S. 62-38 provides: "The Commission shall have the same power and authority to regulate the operation of privately owned public utilities within municipalities as it has to regulate such public utilities operating outside of municipalities, with the exception of the rights of such municipalities to grant franchises for such operation under G.S. 160-2, paragraph 6, and

Power Co. v. City of High Point

such public utilities shall be subject to the provisions of this chapter in the same manner as public utilities operating outside municipalities."

While the facts in *Power Co. v. Membership Corp.*, 253 N.C. 596, 117 S.E. 2d 812 (1961), are quite different from those in the case at hand, we think some of the principles declared there are applicable here. Included are the following (pages 604, 605 and 606, respectively) :

"The Legislature, by granting to municipalities the right to franchise, did not deprive itself of the power to control or to delegate to other public agencies the right to control specific utilities in whole or in part. That it did not intend to give exclusive or unlimited control to municipalities by grant of the right to franchise is, we think, apparent from other legislative acts."

* * *

"The cited sections of our statute law clearly indicate, we think, a legislative delegation of power to the Utilities Commission to say when and under what conditions power companies shall furnish service, and this authority relates to service inside of as well as outside of municipalities. The reason for such legislative action is, we think, readily apparent. Except for those areas served by municipally owned plants or electric membership corporations, the citizens of the State depend primarily on four power companies, Duke, Carolina Power & Light, Virginia Electric & Power, and Nantahala Power & Light, to supply them with current. To invest each of the towns served by these companies with the power to regulate and prescribe and the manner in which service may be rendered inhabitants of the town might well lead to a chaotic condition seriously interfering with the ability of the utility to render equal service to all residing in the area served by it."

* * *

"Courts called upon to determine final authority as between municipalities and State utilities commissions over the operation of public utilities have generally interpreted the statutes in favor of utilities commissions. The reasons are manifest. *Willits v. Pennsylvania Utilities Com'n.*, 128 A. 2d 105; *Jennings v. Connecticut Light & Power Co.*, 103 A. 2d 535; *City of Genesco v. Ill. Northern Utilities Co.*,

Power Co. v. City of High Point

1 N.E. 2d 392; Annotation, 39 A.L.R. 1519. 'Generally, however, the power given by statute to public service commissions to supervise and regulate public utilities supersedes the power of municipalities to regulate such utilities, except where the power is specifically reserved to the municipalities.' 43 Am. Jur. 702."

[3] A city or other municipal corporation is a creature of the State and has no power except that given by the State. 5 Strong, N. C. Index 2d, Municipal Corporations, § 1, page 602, et seq. In *State v. Gullledge*, 208 N.C. 204, 207, 179 S.E. 883, 885 (1935), we find:

"'It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' 1 Dillon Mun. Corp., sec. 89; *S. v. Webber*, 107 N.C., 962; *S. v. Darnell*, 166 N.C., 300."

Quoted with approval in *Smith v. Winston-Salem*, 247 N.C. 349, 354, 100 S.E. 2d 835, 839 (1957).

[2, 4] Admittedly, a city in this State has authority to grant, upon reasonable terms and for a period of not more than 60 years, a franchise for the operation of an electric power transmission or distribution system within the city. G.S. 160A-319. A city also has the power to operate its own electric power transmission or distribution system, 160A-311, et seq., which system is not subject to the control and jurisdiction of the Utilities Commission, G.S. 62-3(23)d. And, the Utilities Commission has the same power and responsibility to regulate the operation of privately owned public utilities within cities as it does their operation outside of cities. G.S. 62-38. Defendants argue that the city's right to grant a franchise gives it the right to oust a franchise holder, either wholly or gradually, when the franchise expires.

[5] The record reveals that High Point owns and operates an electric power distribution system and desires eventually to sell electric power to all residents of the city. It admits, however, that it is not in position to take over all of Duke's customers at

Power Co. v. City of High Point

one time. In fact, the "plan" which it filed proposes a gradual transfer of customers which would extend until June of 1976. Thus, Duke is placed in the position of (1) being subject to regulation of the Utilities Commission, (2) being subject to contractual and statutory obligations to Hall and others similarly situated, and (3) being told by defendant city how and when to stop serving various customers.

Controlling statutes must be construed *in pari materia*. In reconciling here what appears to be a conflict in the effect of the statutes with respect to authority of a municipality as opposed to the Utilities Commission, we are resolving the doubt against the municipality as directed in *State v. Gullledge, supra*, and cases therein cited, and in favor of the Utilities Commission as directed in *Power Co. v. Membership Corp., supra*.

While this does not bear directly on the question presented here, we observe that by the enactment of Chapter 287 (G.S. 160A-331, et seq.), the 1965 General Assembly took a considerable step in recognizing rights of non-municipal suppliers of electric power in cities operating their own systems.

We think our holding that Duke cannot abandon its service to Hall, absent its consent, without the approval of the Utilities Commission, finds support in cases from other jurisdictions. Among these are *City of Genesco v. Ill. N. Utility Co.*, 363 Ill. 89, 1 N.E. 2d 392 (1936), and in a second appeal, 378 Ill. 506, 39 N.E. 2d 26 (1941); and *C & P Tel. Co. v. City of Morgantown*, 144 W. Va. 149, 107 S.E. 2d 489 (1959).

For the reasons stated above, we hold that the last part of paragraph C of the conclusions of law set out in the judgment, beginning with the word "Accordingly," should be eliminated from the judgment. High Point's "Plan of Acquisition, etc." was not properly before the court and no adjudication as to it should be made in this action.

D and E. We approve the conclusions of law set forth in these paragraphs except that the provision in D "and Hall would be without electric service for power for an undetermined period of time" does not appear to be supported by the admitted facts; therefore, that provision will be eliminated.

F. This conclusion of law relates to High Point's "Plan of Acquisition" and for the reasons hereinbefore stated, it is eliminated from the judgment.

Thacker v. Harris

G. We hold that the allowance of plaintiffs' motion for summary judgment was proper.

* * *

The adjudication and relief provided by the judgment are fully supported by the conclusions of law.

Except as hereinbefore modified, the judgment is affirmed.

Modified and affirmed.

Judges HEDRICK and CARSON concur.

JAMES A. THACKER, ADMINISTRATOR OF THE ESTATE OF VICKI LYNN
THACKER V. WALLACE G. HARRIS AND REBECCA SUE HARRIS

No. 7415SC234

(Filed 19 June 1974)

1. Automobiles § 89— sufficiency of evidence of last clear chance

Where plaintiff's evidence would permit but not compel the jury to find that his intestate was walking along the paved portion of a highway just before dark, that during the time defendant drove her car a distance of 900 feet intestate was in defendant's line of vision directly in front of her with nothing to obstruct the view, that there was no approaching traffic or other obstruction to interfere with defendant's opportunity to turn her car toward the center of the street to avoid hitting plaintiff's intestate, and that intestate was not aware of the automobile's approach until the instant of impact, the issue of last clear chance should have been submitted to the jury.

2. Rules of Civil Procedure §§ 8, 15— pleading last clear chance — amendment of complaint

Though plaintiff did not serve a reply alleging last clear chance or use those exact words in his complaint, the complaint was sufficiently particular to give notice that plaintiff intended to offer proof on that issue, and, in any event, the complaint could be amended to conform to the evidence, even after judgment. G.S. 1A-1, Rule 15(b).

APPEAL by plaintiff from *Hall, Judge*, 12 November 1973 Session of Superior Court held in ALAMANCE County.

Action for wrongful death. Plaintiff's intestate, Vicki Lynn Thacker (Vicki), died as a result of injuries received about 6:50 p.m. on 9 November 1970 when she was struck by an automobile driven by defendant, Rebecca Sue Harris, owned by Rebecca's

Thacker v. Harris

father, defendant Wallace G. Harris, as a family purpose vehicle. The accident occurred on Williamson Street in Burlington, N. C. Vicki, age 17, and a girl companion of the same age, Pat Cobb, were walking on the right-hand side of Williamson Street, proceeding toward its intersection with Whitsett Street. Defendant, Rebecca Sue Harris, 18 years old, driving her father's 1960 Oldsmobile, entered Williamson Street from the driveway of her home at 426 Williamson Street, turned to the right, and then proceeded along Williamson Street toward Whitsett Street in the same direction that Vicki and her companion were walking. She had driven approximately 900 feet when her automobile struck Vicki, knocking her to the ground and inflicting the injuries which caused her death.

In summary and as pertinent to this appeal, plaintiff's evidence showed: Williamson Street is a two-lane paved street without sidewalks, the pavement being 21 to 22 feet wide. On the right-hand side of Williamson Street, proceeding in the direction toward the Whitsett Street intersection, there is a grassed dirt shoulder one to one and a half feet wide, then a ditch, which "is maybe a foot deep." On the other side of the ditch at the point where the accident occurred there is "an embankment, maybe five feet high," described by the investigating officer as "sort of a raised yard, gradually raised." From the point where the Harris driveway enters Williamson Street to the point where the accident occurred, Williamson Street is straight, and while there is a slight incline, there is nothing to obstruct the view. At the time of the accident, the weather was clear and the pavement was dry. When the investigating officer arrived a few minutes after the accident, it "had just barely gotten dark." There are street lights in the area, the nearest being 200 or 250 feet away, and another at the corner of Whitsett and Williamson Streets, which is 491 feet away. The speed limit on Williamson Street is 35 miles per hour.

Vicki and her companion, Pat Cobb, were walking side by side, Pat walking on the grassed shoulder and Vicki on the pavement. Vicki was wearing a navy blue all-weather coat. Her hair was "real blond" and she did not wear a hat.

Pat Cobb testified:

"Vicky [sic] and I were walking along talking about my boy friend and getting married and she thought I was too young. I don't recall what type of clothing I had on,

Thacker v. Harris

but I imagine it was dark clothing. The all-weather coat I mentioned that Vicky had on was about knee-length.

“As to how far she was walking away from the right edge, just the length of a person. I mean the width of a person. I would say that was two or three feet. I didn’t see or hear any car. I was facing in the other direction from where the car came. This car came up behind us in the same direction we were walking. The first thing I noticed, I heard a thug [sic] and I looked up and saw Vicky looked like she was flying, not flying but twisted through the air. Not like a person running in a hurry and fell, like the car had hit her up in the air. Then she fell on the grass.”

Plaintiff’s witness, Jack Sheets, who had just arrived for a visit to the Coleman residence, which was across the street and approximately 125 feet up toward Whitsett Street from where the two girls were walking, testified:

“I had just gotten out of my car, just parked. It wasn’t quite dark enough for my lights to be on. I had the parking lights on. . . . Before the accident, when I pulled up to stop at the Coleman house, I saw Vicky Thacker and Mrs. Cobb walking up the street. I knew them. I saw them walking up the street towards me. As to where they were walking with reference to the shoulder and the pavement, there is no curb and gutter on that street, and you walk in the side ditch or on the street. The two girls were walking side by side. It couldn’t help but one of them be on the pavement. As to which one was on the pavement, Mrs. Cobb was what you might say on the yard side or the inside and Miss Thacker was on the road side. When I saw them, I threw my hand up at them. I saw a car behind them. When I saw that car behind them, it was several more houses down the road, but it was heading in the same direction they were and towards me. It was several houses on the other side of them. When I say several, I mean approximately three houses. I remember seeing the car coming, but I don’t remember paying that much attention to the car. It was a few houses back up the road behind the two girls. I could see that all right. As to whether it had lights on or not, I would hate to say under oath whether it had lights on or not, but when I pulled up it was not dark enough for my headlights to be needed.

Thacker v. Harris

"I saw the two girls. I waved and they waved back and at the time I saw the car several houses behind. Then I turned to go toward the front door of the Coleman house and as I approached the front steps I heard the collision and as I turned toward the collision I saw Miss Thacker going through the air. When she was thrown through the air, it was more of a sideways throw than forward, more or less veered off of the car.

" There was no other traffic going in the same direction I was and no other car on the street. I was parked."

Defendant Rebecca Sue Harris testified:

"I left my home at quarter of seven. As I proceeded along there, I was driving on the right-hand side of the road. It is a two-lane road. I had my lights on. That road is straight. It is a straight road. As to the contour of it, there is a slight grade or hill. It is a hill. As to where the vehicle was when it collided with Vicky Thacker, it was at the top of the grade. As I drove along there, my speed was approximately thirty miles per hour.

" I left my home and I started up Williamson Street, and all of a sudden I felt a bump and I heard a noise on the right of my car. I immediately stopped and got out of my car and ran around to the right-hand side of the road because I didn't know what had happened, and I saw Vicky and Pat in the ditch. Vicky was laying down. As to how far she was from the edge of the road, the road levels off and then the ditch. I don't know how far my automobile traveled after I felt the bump. I stopped in the middle of the road. I would say about a hundred feet away from where she was lying.

"I saw Mrs. Cobb. As to how she was dressed, all I remember is dark clothing. I saw Vicky Thacker, and she was also wearing dark clothing. They both had on slacks and coats."

On cross-examination, Rebecca Harris testified:

"I know this street and know there is quite a bit of congestion on the street. There is a school there. There is congestion on both sides of the street. My radio was not playing. Immediately before this accident occurred I was

Thacker v. Harris

driving. I was looking straight ahead. It is my understanding that these people were on the right-hand edge of the road. . . . I had my lights on, and they were working. With my lights shining on a straight road, no hill, and when I was in a distance of say two hundred, I never saw anybody. I never did see anybody. There was no traffic coming or meeting me and no blinding lights in my eyes, just the street light behind me. I don't know how far that street light was behind me. I was about one hundred feet behind the scene of the accident. It was close enough that the street light came to my attention. I had my headlights on and the street light was also shining there at the time of this accident. I didn't ever blow my horn. I never applied my brakes until after this occurred. I never turned aside to avoid hitting the girl. As to Vicky making any sudden move when I passed, I have no idea if she did. I never saw her. I can't say how close to the edge of the pavement I was driving when I was coming down along the street. I know that I was on my side of the road. I don't know how close to the edge of the pavement I was."

Issues of negligence, contributory negligence, and damages were submitted to the jury. The jury answered the first two issues in the affirmative, and from judgment that plaintiff recover nothing of defendants, plaintiff appealed.

Dalton & Long by W. R. Dalton, Jr. for plaintiff appellant.

Sanders, Holt & Spencer by Frank A. Longest, Jr., and Emerson T. Sanders for defendant appellees.

PARKER, Judge.

There was ample evidence to require submission of issues of negligence and contributory negligence. The question presented is whether plaintiff's tendered issue of last clear chance should also have been submitted. We hold that it should.

Discussing the doctrine of last clear chance, Justice Lake, writing the opinion of our Supreme Court in *Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845, after approving the holding but disapproving some of the language of earlier decisions, said:

"In each of those cases, it is clear that what the court held was that to bring into play the doctrine of the last clear chance, there must be proof that after the plaintiff

Thacker v. Harris

had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and, thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so."

[1] Applying these principles to the evidence in the present case and viewing that evidence in the light most favorable to the plaintiff, the jury could find: During the entire time defendant driver drove her car 900 feet along Williamson Street, plaintiff's intestate and her companion were in the driver's line of vision directly in front of her with nothing between them to obstruct her view. Although night was approaching, it was not yet dark, and although the two pedestrians wore dark clothing, they were clearly visible to an acquaintance, who had no difficulty recognizing them without use of headlights on his car and at a distance of 125 feet. Plaintiff's intestate was walking, with her back to the direction from which defendant driver was approaching, on the paved portion of the street some two to three feet from the right-hand edge of the pavement and in defendant driver's lane of travel. Neither plaintiff's intestate nor her companion were aware of the automobile's approach until the instant of impact. There was no approaching traffic or other obstruction to interfere with defendant driver's opportunity to turn her car toward the center or left-hand portion of the street in order to avoid hitting plaintiff's intestate.

Defendant driver owed to plaintiff's intestate, and to all others using the street on which she was driving, the duty to maintain a lookout in the direction in which she was traveling and to see what was there for her to see. On the evidence in this record, the jury could find that had she maintained a proper lookout, she could, and in the exercise of due care should, have seen plaintiff's intestate walking on the traveled portion of the street in front of her, in a position of obvious peril; she could, and in the exercise of due care should, have observed that plaintiff's intestate was inadvertent to her peril; after, in the exercise of due care, she should have discovered this inadvertence, she still had sufficient time and means to avoid the injury, but negligently failed to do so. These findings, if made by the jury, would support a verdict that defendant driver had the last clear chance to avoid the accident. We do not sug-

State v. Camp

gest that the evidence would compel such findings, as to which in any event plaintiff would have the burden of proof. We do hold that the evidence was such as to give rise to an issue as to the last clear chance and such issue should have been submitted to the jury. This holding is supported by the decision in *Wanner v. Alsup*, 265 N.C. 308, 144 S.E. 2d 18.

[2] We note that Section 1 of Chap. 1156 of the 1971 Session Laws amended G.S. 1A-1, Rule 7(a) to include provision that "[i]f the answer alleges contributory negligence, a party may serve a reply alleging last clear chance." Here, plaintiff did not serve a reply and did not allege last clear chance by using those exact words in his complaint. However, he did allege in his complaint, among other allegations of negligence, that "[w]hen she [referring to defendant driver] saw, or by the exercise of due care should have seen, that a collision with plaintiff's intestate was imminent, and so saw or could have seen in time to avoid a collision, she failed and neglected to take steps to avoid a collision." This pleading was sufficiently particular to give notice that plaintiff intended to offer proof of occurrences giving rise to last clear chance, and under our new Rules of Civil Procedure the complaint here was sufficient under Rule 8 to justify submitting to the jury an issue as to last clear chance. In any event, the complaint could be amended to conform it to the evidence, even after judgment. Rule 15(b); *Swift & Co. v. Young*, 107 F. 2d 170.

For failure of the trial court to submit plaintiff's tendered issue as to last clear chance, plaintiff is entitled to a

New trial.

Judges VAUGHN and CARSON concur.

STATE OF NORTH CAROLINA v. SAMUEL LEE CAMP

No. 7427SC384

(Filed 19 June 1974)

Bastards § 7; Criminal Law §§ 31, 55— blood grouping tests— judicial notice of laws of genetics— paternity— exclusion of defendant— peremptory instructions

In a prosecution for failure to support an illegitimate child wherein defendant presented testimony by a physician that he had

State v. Camp

tested the blood of defendant, the mother and the child, and that both defendant and the mother were of blood group O while the child was of blood group A, the trial court should have taken judicial notice that under the laws of genetics and heredity a man and woman of blood group O cannot have a child of group A and should have so instructed the jury, and the court should have also instructed the jury that it would be their duty to return a verdict of not guilty if they believed the testimony of the physician and believed that the blood grouping tests were properly administered.

APPEAL by defendant from *Friday, Judge*, 29 October 1973 Session of Superior Court held in GASTON County.

Heard in the Court of Appeals 8 May 1974.

Defendant was charged with failure to support his illegitimate child. He was convicted in the District Court and appealed to the Superior Court for a trial de novo. At the trial in Superior Court, Mary Louise Hames was the only witness for the State. She testified that she was the mother of Timothy Taneau Hames, who was born on 12 July 1973. She became pregnant in October 1972. During that month she had sexual intercourse with defendant two or three times a week, and she did not have intercourse with any other man. After the child was born, she asked defendant to support it. He refused to do so and denied that he was the child's father.

Dr. Eugene Dell Rutland, Jr., a physician, was the only witness for defendant. He testified that he had tested the blood of Mary Louise Hames, Timothy Taneau Hames and defendant. The blood tests revealed that both Miss Hames and defendant were of blood group O, while the child was of blood group A. Under the laws of heredity two parents of group O cannot have a child of group A.

The jury found defendant guilty, and he was sentenced to six months' imprisonment, suspended on condition that he pay \$15.00 per week for the support of the child, plus \$620.00 for expenses already incurred. Defendant appealed to this Court.

Attorney General Robert Morgan, by Deputy Attorney General Jean A. Benoy, for the State.

Atkins & Layton, by Nicholas Street, for defendant appellant.

State v. Camp

BALEY, Judge.

The issue presented by this case is: May the courts take judicial notice of the principles of heredity upon which blood tests for paternity are based? Our answer is yes. The trial court in this case should have taken judicial notice that two parents of blood group O cannot have a child of blood group A, and the jury should have been so instructed.

"There are many facts of which the court may take judicial notice, and they should take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind." *State v. Vick*, 213 N.C. 235, 238, 195 S.E. 779, 780-81; see McCormick, Evidence 2d, §§ 328-30; 1 Stansbury, N. C. Evidence (Brandis rev.), §§ 11, 14. Courts frequently take notice of scientific facts and principles. *E.g.*, *State v. Key*, 248 N.C. 246, 102 S.E. 2d 844; *Kennedy v. Parrott*, 243 N.C. 355, 90 S.E. 2d 754; *Ingold v. Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173. "A judge of court may take judicial notice of any fact in the field of any particular science which is either so notoriously true as not to be the subject of reasonable dispute or is capable of demonstration by resort to readily accessible sources of indisputable accuracy." *Kennedy v. Parrott*, *supra* at 358, 90 S.E. 2d at 756.

Blood tests for paternity are based on the laws of genetics. The theory behind them may be summarized as follows:

"A blood-grouping test involves examining an individual's red blood cells to determine if either or both of two substances known as agglutininogen A and agglutininogen B are present. The individual's blood group is described accordingly: if both substances are present, the blood group is classified as group AB; if neither is present, the blood is classified as group O; and if only agglutininogen A or agglutininogen B is present, the blood group is A or B respectively.

"Blood groups have three important qualities which enable certain conclusions to be drawn about the identity of a child's parents. The first is that the blood group of a person can be determined at birth or very shortly thereafter. In addition, an individual's blood group remains constant throughout life, unaffected by age, disease or medication. Perhaps more importantly, a child inherits his blood

State v. Camp

group from his parents in accordance with certain known laws of genetics. By these laws, if a particular agglutinin does not appear in the red blood cells of either the mother or father, it cannot appear in the red blood cells of the child. Also, a parent with group AB blood cannot have a child with group O blood (regardless of the blood group of the other parent), nor can a parent with group O blood have a child with group AB blood."

Note, *Family Law—Blood-Grouping Tests and the Presumption of Legitimacy*, 50 N.C.L. Rev. 163, 165. For more extended discussion, see McCormick, *supra*, § 211, at 518-20; 1 Wigmore, Evidence 3d, §§ 165a-b; Comment, *Evidence—The Use of Blood Grouping Tests in Disputed Parentage Proceedings—A Scientific Basis for Discussion*, 50 Mich. L. Rev. 582. In the present case, agglutinin A was present in the blood of Timothy Taneau Hames, but it was not present in his mother's blood or in defendant's blood. Therefore, defendant could not be the father of the child.

The reliability of blood grouping tests, and the validity of the scientific principles which underlie them, are generally accepted among scientists. As stated in Schatkin, *Law and Science in Collision: Use of Blood Tests in Paternity Suits*, 32 Va. L. Rev. 886, 890:

"[B]lood tests are accurate, reliable and certain, and when they result in exclusion, they provide us with incontrovertible and inexorable proof of the defendant's non-paternity."

Comment, *Conclusiveness of Blood Tests in Paternity Suits*, 22 Md. L. Rev. 333, 338, states:

"Even the most conservative discussions of the development of blood testing emphasize its almost absolute accuracy, at least where exclusion is found. While there remains the possibility that, in a given case, mutation may occur to cause an apparent exception to the Mendelian laws of inheritance, statistical studies would seem to reduce this possibility to an infinitesimal chance."

Case Comment, *Blood Grouping Test Results: Evidential Fact or Conclusion of Law?*, 23 Wash. & Lee L. Rev. 411, 417-18:

"The medical profession does not claim that the tests are infallible . . . but instead admits there are theoretical

State v. Camp

exceptions—one in approximately 50,000 to 100,000 cases. Such exceptions, however, are of little importance when it is considered that when 'tests are accurately performed there is hardly any other evidence that can approach in reliability the conclusions based on such blood tests.' By considering the results of all of the tests which are readily performable, the probabilities are one in one hundred billion that such an exception will occur."

Note, *Children Born in Wedlock: Blood Tests and the Presumption of Legitimacy in Missouri*, 39 U.M.K.C.L. Rev. 121, 125-26:

"Not only are the medical experts in agreement about the reliability of blood tests in determining paternity, but also, their reliability has been remarkably verified in both Europe and the United States. For example, during a ten year period of tests in affiliation cases before the Court of Special Sessions in New York City 65 exclusions resulted from 656 blood tests and 100% of the exclusions were followed by the mother's first confession of sexual relations with a man other than the alleged father during the conception period. Similar verification has been found in the Children's Court of the City of Buffalo, New York. In Europe, where blood test exclusions are regarded as conclusive proof of nonpaternity, the exclusions are 'almost invariably followed by the mother's belated confessions' The biological certainty of over 99.99% found in the ABO exclusion . . . and the verification found in courts where it has been used, makes it one of the most reliable methods of proof available to the courts."

In addition, see Ross, *The Value of Blood Tests as Evidence in Paternity Cases*, 71 Harv. L. Rev. 466; Whitlatch & Marsters, *Contributions of Blood Tests in 734 Disputed Paternity Cases: Acceptance by the Law of Blood Tests as Scientific Evidence*, 14 West. Res. L. Rev. 115.

Many courts have recognized the accuracy of blood grouping tests. In *State v. Damm*, 64 S.D. 309, 312, 266 N.W. 667, 668 (1936), the court held:

"[I]t is our considered opinion that the reliability of the blood test is definitely, and indeed unanimously, established as a matter of expert scientific opinion entertained by authorities in the field"

State v. Camp

Clark v. Rysedorph, 281 App. Div. 121, 123, 124, 118 N.Y.S. 2d 103, 104, 106 (1952).

"The principle underlying blood tests is that certain characteristics or properties of the blood of a parent perpetuate themselves in that of his or her offspring in accordance with the Mendelian Law, and that the results of such tests are relevant in the determination of whether a given child is the offspring of a specified adult or whether a given adult is the mother or father of a particular child. . . . To reject such testimony is to ignore scientific facts. This we may not do."

Anonymous v. Anonymous, 10 Ariz. App. 496, 498, 499, 460 P. 2d 32, 34, 35 (1969) :

"Both the existence of various blood types and Mendel's Law of Hereditary Characteristics are universally [*sic*] accepted in scientific fields." To allow a jury to ignore them "would be tantamount to this court, by judicial decree, declaring the laws of motion and gravity to be repealed."

Cortese v. Cortese, 10 N.J. Super. 152, 156, 157, 76 A. 2d 717, 719, 720 (1950) (Brennan, J.) :

"The value of blood tests as a wholesome aid in the quest for truth in the administration of justice . . . cannot be gainsaid in this day. Their reliability as an indicator of the truth has been fully established. . . . It is plain we should hold, as we do, that this unanimity of respected authorities justifies our taking judicial notice of the general recognition of the accuracy and value of the tests when properly performed by persons skilled in giving them. The law does not hesitate to adopt scientific aids to the discovery of truth which have achieved such recognition."

Commonwealth v. D'Avella, 339 Mass. 642, 645-46, 162 N.E. 2d 19, 21 (1959) :

"The reliability of such tests to prove nonpaternity is well established as a scientific fact. Evidence which is regarded and acted upon every day as conclusive by skilled scientists outside of court ought not to be treated merely as some evidence (to be believed or disbelieved as the trier of fact sees fit) when it is adduced in court. We cannot close our eyes to the overwhelming weight of scientific

State v. Camp

opinion on this subject and we take judicial notice of it. . . . When science acquires knowledge whereby the ascertainment of truth in these cases is certain, courts ought not to ignore such knowledge; on the contrary they should welcome it."

In *Wright v. Wright*, 281 N.C. 159, 172, 188 S.E. 2d 317, 326, the Supreme Court of North Carolina stated:

"Blood-grouping tests which show that a man cannot be the father of a child are perhaps the most dependable evidence we have known."

Since the accuracy of the blood test is universally accepted, the courts should take judicial notice of it. The courts of New Jersey and Massachusetts did so in the *Cortese* and *D'Avella* cases quoted above. In addition, the Supreme Court of Nebraska judicially noticed the test's validity in *Houghton v. Houghton*, 179 Neb. 275, 137 N.W. 2d 861 (1965). Other courts have set aside jury verdicts that were in conflict with blood test results, or even treated the test results as conclusive. *Retzer v. Retzer*, 161 A. 2d 469 (D.C. Mun. Ct. App. 1960); *Jordan v. Mace*, 144 Me. 351, 69 A. 2d 670 (1949); *Anonymous v. Anonymous*, 1 App. Div. 2d 312, 150 N.Y.S. 2d 344 (1956); *Clark v. Rysedorph*, *supra*; *Rose v. Rose*, 16 Ohio App. 2d 123, 242 N.E. 2d 677 (1968); *Commonwealth v. Coyle*, 190 Pa. Super. 509, 154 A. 2d 412 (1959). The contrary view, the view that the jury may freely accept or reject the blood test results, "is dying out." *McCormick*, *supra*, § 211, at 521 n. 95.

The State contends that under *State v. Fowler*, 277 N.C. 305, 177 S.E. 2d 385, the jury must be left entirely free to accept or reject the blood test evidence as it chooses. In making this contention, the State misinterprets the *Fowler* case. In *Fowler* the Supreme Court held that blood test results cannot be regarded as conclusive. *Id.* at 310, 177 S.E. 2d at 387. This decision was eminently correct, for two reasons. First, a blood test is of no value unless it is properly administered. If the doctor conducting the tests does not follow the correct procedures, an incorrect result may be obtained. See *Anonymous v. Anonymous*, 10 Ariz. App. 496, 460 P. 2d 32 (1969); *Littell & Sturgeon, Defects in Discovery and Testing Procedures: Two Problems in the Medical Application of Blood Grouping Tests*, 5 U.C.L.A.L. Rev. 629. Second, it is always possible that blood test results may be falsely reported. In every case the jury has the right to find

State v. Camp

that a witness is lying and refuse to believe his testimony. See *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297. For these two reasons, it would be unjust to treat blood test evidence as conclusive. But it would be even more unjust to give the jury unlimited freedom to accept or reject at whim the results of a properly conducted blood test; and the *Fowler* case does not require such an unjust result. Indeed, the *Fowler* opinion expressly states: "The only areas in which the results of blood grouping tests should be open to attack are in the method of testing or in the qualifications of the persons performing the tests." 277 N.C. at 309, 177 S.E. 2d at 387.

In the present case the trial judge instructed the jury as follows: "Now, for the defendant, members of the jury, you will recall that Dr. Eugene D. Rutland took the stand as a witness. . . . He said that in his opinion a male and female with group 'O' cannot produce an infant with group 'A' blood." The court thus treated a scientific principle as the opinion of a single doctor. Faced with the choice between the unequivocal testimony of Miss Hames and the personal opinion of a single doctor, the jury not surprisingly accepted the mother's testimony and found defendant guilty. The instructions given by the court constitute prejudicial error.

The court should have taken judicial notice that a man and woman of blood group O cannot have a child of group A. The jury should have been instructed to the effect that under the laws of genetics and heredity a man and woman of blood group O cannot possibly have a child of blood group A and that if they believed the testimony of the doctor and believed that the tests were properly administered, it would be their duty to return a verdict of not guilty.

For error in the charge, defendant is entitled to a new trial.

New trial.

Chief Judge BROCK and Judge PARKER concur.

Sides v. Hospital

LARRY WAYNE SIDES, ADMINISTRATOR OF THE ESTATE OF TERRY COMPTON SIDES v. CABARRUS MEMORIAL HOSPITAL, INC.; J. VINCENT AREY; JOHN R. ASHE, JR.; CABARRUS CLINIC FOR WOMEN, P.A.; J. O. WILLIAMS; WILLIAM J. REEVES AND NANCY ELIZABETH DEASON

No. 7419SC449

(Filed 19 June 1974)

1. Appeal and Error § 6— appeal from denial of summary judgment— jurisdictional question

While there is generally no right of appeal from denial of a motion for summary judgment, G.S. 1-277(b) does give a defendant the right to appeal the judge's ruling as to jurisdiction over the defendant.

2. Municipal Corporations § 1— definition and function of municipal corporation

A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory and the people embraced within these limits; however, the term "municipal corporation" should not be construed narrowly to include only cities, towns, counties and school districts, but in its broader sense the term includes all public corporations exercising governmental functions within constitutional limitations.

3. Hospitals § 1; Municipal Corporations § 1— hospital as county agency and not municipal corporation

In passing a local act providing for the establishment of a hospital in Cabarrus County, the Legislature intended the hospital to be a county agency and not a separate municipality, since by granting corporate status the Legislature was granting the hospital only the right to own property and make contracts, not the right to assist in the civil government of the area embraced by the hospital.

APPEAL by defendant, Cabarrus Memorial Hospital, Inc., from *Exum, Judge*, at the 3 September 1973 Session of CABARRUS Superior Court.

Heard in the Court of Appeals 15 May 1974.

This action was instituted on the 4th day of April, 1973, by Larry Wayne Sides, Administrator of the Estate of Terry Compton Sides, deceased, to recover the sum of One Hundred Twenty Thousand Dollars (\$120,000) for personal injuries and the sum of One Million Five Hundred Thousand Dollars (\$1,500,000) for the wrongful death of plaintiff's intestate who died on the 6th day of April, 1971, allegedly as a result of the negligence of several defendants, including Cabarrus Memorial Hospital. The defendant Cabarrus Memorial Hospital filed a

Sides v. Hospital

Motion to Dismiss under the provisions of Rule 12(b) (1), (2) and (6) of the North Carolina Rules of Civil Procedure on the grounds (1) that the Court does not have jurisdiction over the subject matter, (2) does not have jurisdiction over the defendant Cabarrus Memorial Hospital and (3) that the plaintiff has failed to state a claim against the defendant Cabarrus Memorial Hospital upon which relief can be granted.

The cause came on for hearing before his Honor James G. Exum, Jr., Judge Presiding at the September 3, 1973, Session of the Superior Court of Cabarrus County, and was treated by the court as a Motion for Summary Judgment under the provisions of Rule 56 of the North Carolina Rules of Civil Procedure. At the hearing, the court heard the arguments and stipulations of counsel, considered affidavits, and requested that the parties stipulate that its decision might be rendered out of session and out of district. The parties did so agree. An Order Denying Summary Judgment and Motion for Dismissal was entered by the Court on the 19th day of February, 1974. From said Order, the defendant Cabarrus Memorial Hospital timely excepted and appealed to the Court of Appeals of North Carolina under the provisions of G.S. 1-277 (b).

Byrd, Byrd, Ervin & Blanton by John W. Ervin, Jr., for plaintiff appellee.

Hartsell, Hartsell & Mills, P.A., by William L. Mills, Jr., and Fletcher L. Hartsell, Jr., for defendant appellant, Cabarrus Memorial Hospital.

CAMPBELL, Judge.

[1] The plaintiff filed a motion to dismiss this appeal on the grounds that defendant had no right of appeal from the denial of the motion for summary judgment. While there is generally no right of appeal in such cases, G.S. 1-277 (b) does give the defendant the right to appeal the judge's ruling as to jurisdiction over the defendant.

Defendant, Cabarrus Memorial Hospital, (Hospital) contends that it is an agency of the State of North Carolina, in the nature of a municipality or public corporation separate and apart from Cabarrus County. The Hospital further contends that the purchase of liability insurance covering the Hospital by the county is not binding on the Hospital and does not waive its

Sides v. Hospital

governmental immunity and that since the Hospital is immune the court is without jurisdiction.

Defendant further argues that it must be a municipality or public corporation because otherwise, under Article VIII, Section 1, of the North Carolina Constitution, its very existence would be unconstitutional.

Article VIII, Section 1, of the North Carolina Constitution provides:

"Corporate charters. No corporation shall be created, nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering, organization, and powers of all corporations, and for the amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general acts may be altered from time to time or repealed. The General Assembly may at any time by special act repeal the charter of any corporation."

Defendant does not make the argument that it was created by the Legislature as a charitable organization. A public hospital maintained primarily as a charitable institution has no charitable immunity. *Rabon v. Hospital*, 269 N.C. 1, 152 S.E. 2d 485 (1967). Nor apparently does defendant make the argument that it is a State hospital for the mentally disturbed under N.C.G.S. Chapter 122 or a State sanatorium for tuberculosis under certain portions of N.C.G.S. Chapter 131. Indeed, the State of North Carolina is not directly involved in the operation, supervision, administration, or funding of Cabarrus Memorial Hospital. The employees of the Hospital are members of the North Carolina Local Governmental Employees' Retirement System.

Defendant has cited a number of cases from other jurisdictions holding county and municipal hospitals governmentally immune. However, these cases accepted the premise that the hospital in question was an agency of the local government and the holdings of those courts are based on the determination that the furnishing of the health care is a governmental and not proprietary function. This doctrine does not affect the issue before us in this case.

Sides v. Hospital

[2] The issue then is whether Cabarrus Memorial Hospital is a municipality. The term "municipality" or "municipal corporation" has been defined at various places in the North Carolina General Statutes as any incorporated city, town or village, or a county. G.S. 160-456(9), G.S. 157-3(14), G.S. 143-229(6). In the case law, "A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory and the people embraced within these limits." *Smith v. Winston-Salem*; *Thomas v. Winston-Salem*, 247 N.C. 349, 100 S.E. 2d 835 (1957). However, the term "municipal corporation" should not be construed narrowly to include only cities, towns, counties and school districts, but in its broader sense the term includes all public corporations exercising governmental functions within constitutional limitations. *Wells v. Housing Authority*, 213 N.C. 744, 197 S.E. 693 (1938). A municipal corporation must have a public purpose and be invested with a governmental function. What is a "public purpose" for which the General Assembly may create a municipal corporation is a question for the courts to determine on the basis of the end sought to be reached and the means used, rather than of statutory declarations. *Wells v. Housing Authority*, *supra*. In several instances, entities other than cities and towns have been held to be, in essence, municipalities or quasi municipalities in that they were created for a public purpose and vested with a governmental function. (Municipal housing authority) *Wells v. Housing Authority*, *supra*; *Cox v. Kinston*, 217 N.C. 391, 8 S.E. 2d 252 (1940); *Mallard v. Housing Authority*, 221 N.C. 334, 20 S.E. 2d 281 (1942); *Powell v. Housing Authority*, 251 N.C. 812, 112 S.E. 2d 386 (1960). (Municipal airport authority) *Airport Authority v. Johnson*, 226 N.C. 1, 36 S.E. 2d 803 (1946). See also *Webb v. Port Commission*, 205 N.C. 663, 172 S.E. 377 (1934). But see *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310 (1953).

Ch. 307 [1935] N.C. Pub.-Local and Priv. L., p. 276 (Chapter 307) authorized the Cabarrus County Commissioners, upon a majority vote of said commissioners or upon petition of two hundred voters of said county to order an election on the issue of whether the county should be allowed to issue bonds for the establishment of a hospital to be known as Cabarrus County Hospital (now Cabarrus Memorial Hospital) and to levy a special tax to pay off said bonds. If the election succeeded, the Treasurer of Cabarrus County was to act as treasurer for the

Sides v. Hospital

Hospital. All proceeds from the sale of bonds and the special tax were to be paid into the Cabarrus County Treasurer who was to pay the interest on the bonds, to pay off the bonds at maturity, and to receive and pay out all other monies under the control of, and at the direction of, the executive committee of the Hospital. The trustees of the Hospital were to be selected by the Board of County Commissioners. The trustees were to select an executive committee which would fill any vacancies on the Board of Trustees and which would adopt rules and regulations for the governing of the Hospital, and which would file with the county commissioners an annual report of their proceedings and a statement of all receipts and expenditures and a certification of the amount necessary to maintain the Hospital in the ensuing year. The stated purpose of the establishment of the Hospital was to be "for the benefit of the inhabitants of Cabarrus County, and of any person falling sick or being maimed within its limits." Finally the act provided:

"Sec. 9. That 'Cabarrus County Hospital' is hereby declared to be a body corporate, with power to receive and hold gifts, grants, and devises of real and personal property, to sue and be sued, and to do any and all lawful acts necessary to carry out the objects of its creation, and shall possess all other rights and powers usually incident to corporations."

[3] This last portion of the act of the Legislature is the only reference in the act to any corporate existence. It seems clear that the Legislature, by granting corporate status, was not establishing a municipality but was granting the Hospital the right to own property and make contracts. There were provisions in the general law for incorporating county hospitals at the time. See G.S. 131-4, *et seq.* However, under the general law, the special tax that the County Commissioners were authorized to impose was limited to one-fifteenth ($1/15$ th) of one cent per one hundred dollar valuation. Chapter 307 allowed the Cabarrus County Commissioners to impose a special tax of two cents per one hundred dollar valuation. Furthermore, the general law provided for the popular election of the Board of Trustees of a county hospital contrary to the procedures established in Chapter 307. In all other respects, the act establishing Cabarrus Memorial Hospital is virtually identical with the general laws in effect at the time for the establishment of public hospitals by counties. We can discern no intent by the Legislature to establish the Hospital as a separate municipality to assist in the civil

Sides v. Hospital

government of the area embraced by the Hospital and to cloak that municipality with governmental immunity. See *Lee v. Poston*, 233 N.C. 546, 64 S.E. 2d 835 (1951). It seems clear that the Legislature intended Cabarrus Memorial Hospital to be a county agency and went to the separate corporate format by the special act to avoid using the general law available. A review of the Public-Local and Private Laws shows that the Legislature used this device for creating county hospitals on a number of other occasions. We would point out that in several opinions or rulings by various agencies, Cabarrus Memorial Hospital has been held to be an agency or instrumentality of the county:

1) North Carolina Attorney General and the North Carolina Local Governmental Employees' Retirement System ruled that the Hospital was a wholly-owned instrumentality of the county and was a separate political subdivision of government for retirement purposes and was eligible for participation in the Local Governmental Employees' Retirement System.

2) The North Carolina Employment Security Commission ruled that the Hospital was an instrumentality of the county and therefore exempt under the Employment Security Law.

3) The Attorney General ruled that although the Hospital was a corporation separate from the county, it was a direct instrumentality of the county and that suits brought by the Hospital were in reality brought by the county and that therefore it was exempt from paying any process tax or sheriff's fee.

4) The North Carolina Department of Revenue ruled that the Hospital was a county-owned and operated hospital, that it was in integral part of the county operation, and, therefore, that any application for refund of gasoline taxes paid by the Hospital must be incorporated with the county's application.

5) The Attorney General ruled that the Hospital was a county agency and therefore subject to the provisions of G.S. 143-129 relating to bidding on public contracts.

6) The United States Internal Revenue Service ruled that the Hospital was an instrumentality of the county and therefore not subject to federal income tax.

The defendant Cabarrus Memorial Hospital is a county agency and is bound by the county's purchase of insurance for the defendant. Defendant's argument that it may accept the benefit of county bonds, county taxes, use of the county treasury

State v. White

and treasurer and exemption from taxation as a county agency but that it may disavow the county's purchase of insurance is without merit. Each instance merely involves a cost of doing business. We find no error in the denial by the trial court of defendant's motion to dismiss and the denial of its motion for summary judgment.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. WILLIS WHITE

No. 7426SC313

(Filed 19 June 1974)

1. Criminal Law § 92— consolidation of misdemeanor and felony charges —two victims

The trial court did not err in the consolidation for trial of a charge of misdemeanor larceny of an automobile from one person and felony charges of kidnapping and rape of a second person where the automobile was stolen an hour before the felonies were committed and was used in the commission of the felonies. G.S. 15-152; G.S. 7A-271(a) (3).

2. Criminal Law § 66— pretrial showup — in-court identification — independent origin

The trial court's determination that an in-court identification of defendant was of independent origin and not tainted by a pretrial showup was supported by the evidence where it tended to show that an automobile stopped within six or seven feet of the witness, that the witness observed defendant sitting on the passenger side for some five or ten seconds, that defendant pointed a gun at the witness, that the witness ran and observed the stature of the passenger who got out of the automobile from a distance of 100 feet, and that the confrontation took place in a well-lighted parking lot.

3. Criminal Law § 66— pretrial identification at automobile — in-court identification — independent origin

Rape and kidnapping victim's in-court identification of defendant was of independent origin and was not tainted by her identification of defendant at the automobile used in the crimes less than one hour after the victim departed the automobile where the victim was in the presence of defendant for an hour and a half during commission of the crimes and had a sufficient opportunity to observe defendant during such time.

State v. White

4. Criminal Law § 80— motion to see witness's report — denial

In a prosecution for kidnapping, rape and automobile larceny, the trial court did not err in the denial of defendant's motion to be allowed to see the report of a witness which had been reduced to writing by the police where the document was not used in the trial, defendant's counsel made no written request for it prior to trial pursuant to G.S. 15-155.4, and the record does not show that the report was material or favorable to the defense.

APPEAL by defendant from *Grist, Judge*, 10 September 1973 Session of Superior Court held in MECKLENBURG County.

This is a criminal action wherein the defendant, Willis White, was charged with the kidnapping and rape of Martha Wortham and misdemeanor larceny of an automobile. The defendant entered pleas of not guilty as to all three charges and after entry of these pleas, the State moved to consolidate the three cases for trial. The motion to consolidate all charges for trial was granted over the objection of the defendant. At trial the State offered evidence which tended to establish the following:

About 8:30 or 9:00 p.m. on 3 June 1973, Martin Davis, Jr., drove his 1962 Pontiac automobile into a drug store parking lot on Remount Road in Charlotte, N. C. As he started to get out of the vehicle, two Negro males, one of whom was armed with a pistol, approached Davis and forced him into the back seat of the automobile. The two men got into the front seat and drove the vehicle away with Davis still in the back seat. Approximately ten minutes later, Davis was able to escape from the two men by jumping from the moving vehicle. Davis did not see his vehicle again until the next morning at the police station.

About 10:15 p.m. on the same evening, Willie L. Bandy and his girl friend, Martha Wortham, were walking across a parking lot at a shopping center on N. C. Highway #16 when a vehicle, later identified as Davis' 1962 Pontiac, came speeding toward them. The vehicle, in which two Negro males were riding, came to a stop near Bandy and Wortham, and the defendant, who was seated on the passenger side, pointed a pistol at them. Upon seeing the pistol, Bandy and Wortham started running; however, the defendant and his accomplice caught the girl and forced her into the car.

The defendant then drove to a dead end road about five miles away and stopped the vehicle. He ordered Wortham to

State v. White

get in the back seat and had sexual intercourse with her against her will. Defendant then drove the car to another dead end street and again forced the victim to engage in sexual intercourse with him. After the completion of this sexual act, the defendant passed out and the young lady was able to escape. She ran to a nearby house and the police were called. The Charlotte police arrived and questioned her, then left, and located the vehicle which she had described to them. The officers found the defendant asleep or unconscious in the back seat of the car along with the victim's shoes, purse, and some of her clothing. A .22 caliber pistol was found in the front seat.

Evidence offered by the defendant tended to establish that on the day in question, he was playing cards with friends from about 9:30 p.m. until 11:45 p.m. At midnight the defendant left the card game to get some whiskey and as he was crossing a street, a police car came by, something was said, and defendant used profanity toward the officers. Defendant was then knocked unconscious by someone and when he came to he was in the backseat of a police car. A police officer was also in the back seat with him and was beating defendant with a flashlight. Defendant was again knocked unconscious and when he regained consciousness for the second time he was in the back seat of a Pontiac automobile, with one leg outside the car and his hands handcuffed. His pants and underpants were around his ankles. Defendant testified that the police officers were again hitting him and he was placed in a police car. After he was placed in the police car, Officer Walker pulled his head back by the hair and a Negro officer burned defendant with a cigar on his chest. Burn marks were observed in the area of the defendant's throat when he was booked at the jail and he was treated for burns while in custody.

After presentation of the evidence, the jury returned the following verdicts: not guilty of rape; not guilty of larceny of property valued at less than \$200.00; guilty of kidnapping. From a judgment that the defendant be imprisoned for a term of not less than twenty-five (25) nor more than forty (40) years, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney General Richard F. Kane for the State.

John B. Whitley for the defendant appellant.

State v. White

HEDRICK, Judge.

[1] Defendant's first three assignments of error serve, in essence, only to raise one question: Did the trial court commit error in granting the State's motion, over defendant's objection, to consolidate for trial the charges of kidnapping, rape, and misdemeanor larceny? Defendant contends that it was improper to consolidate the misdemeanor larceny with the kidnapping and rape offenses, while the State submits that the trial judge, acting pursuant to G.S. 15-152, was correct in granting the motion for consolidation.

G.S. 15-152 provides in pertinent part as follows:

"When there are several charges against any person for the same act or transaction or *for two or more acts or transactions connected together*, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; * * * ." (Emphasis added.)

Defendant's contention that it was improper to consolidate a warrant charging misdemeanor larceny with the felonies of rape and kidnapping is resolved by making a reference to *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971), cert. denied 404 U.S. 1023 (1972). In that case, consolidation of a warrant charging a misdemeanor and a felony was allowed and the court stated: "It is noted that the Superior Court has jurisdiction to try a misdemeanor which may be properly consolidated for trial with a felony under G.S. 15-152. G.S. 7A-271(a) (3)." Thus we must consider only whether the acts or transactions are so connected together in time and circumstances as to merit consolidation. The evidence introduced by the State tends to show that Martin Davis' 1962 Pontiac was stolen by two Negro males as late as 9:00 p.m. on 3 June 1973. Approximately an hour later this same car approached Martha Wortham and Willie Bandy in a parking lot. These two witnesses testified that there were two Negro males in the car, one of whom was the present defendant. The two men forced Martha Wortham into the car, and the defendant subsequently raped her twice in the back seat of the car. Clearly, the three offenses were connected by time (approximately one hour) and circumstances (the presence of the car) and obviously constitute a continuing criminal episode. See, *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974). More-

State v. White

over, it is important to note that the defendant was found not guilty of the misdemeanor larceny charge. Notwithstanding this fact, the defendant maintains that he was still prejudiced by the consolidation of the charges, contending that he never would have been convicted of kidnapping without such consolidation. This argument is founded upon nothing more than mere speculation and has no merit.

Defendant's fourth and fifth assignments of error are directed to the in-court identification of the defendant made by witnesses Bandy and Wortham. Defendant contends their testimony was tainted by impermissible pre-trial identification procedures. Prior to admitting the challenged testimony, the trial court, adhering to the accepted practice, conducted a voir dire hearing and made findings which are discussed below.

[2] With regard to witness Bandy, the trial court found as a fact that an automobile came to a stop within six or seven feet of the witness and that defendant pointed a gun at the witness; that the witness observed the defendant White sitting on the passenger side of the vehicle for some five or ten seconds; that this confrontation took place in a well-lighted parking lot; that the witness ran, and "that the witness saw the individual who was seated in the right-hand front seat of the automobile get out of the car, observed his stature and form from a distance which he characterized as being one hundred feet"

In the early morning hours of 4 June 1973, witness Bandy again observed the defendant in what is generally described as a showup for approximately one minute. At the end of this observation period, the witness made a positive identification of the defendant as being the same person whom he had observed earlier in the evening. This identification took place approximately four hours after the events of 3 June 1973, and Bandy did not hesitate in his identification of defendant, nor did he identify any other person as being a probable suspect.

Based upon these findings, the trial court concluded that the in-court identification of defendant by the witness Bandy was of independent origin and not the result of an impermissibly suggestive out of court confrontation.

We turn, then, to the central question: whether, under the factual circumstances of this case, the identification was reliable

State v. White

notwithstanding the confrontation procedure employed by the police. In *Neil v. Biggers*, 409 U.S. 188 (1972), the United States Supreme Court enumerated the factors to be considered in evaluating the likelihood of misidentification. These factors include: "... the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers, supra*, at 190. Applying these factors to the case at hand, we are of the opinion that the trial court's findings, which are binding on this court because they are supported by plenary competent evidence, *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1973), are sufficient to support the conclusion that the identification was of independent origin.

[3] As to the witness Wortham, the trial court concluded that her in-court identification was of independent origin, based on its findings that she had been in the presence of the defendant for approximately an hour and a half, and that during this time the witness had sufficient opportunity to observe the defendant. Furthermore, the trial court found "that the identification [of defendant by Wortham in the presence of the police] at the automobile on Kenney Street took place within less than one hour of her having departed from the automobile and that the identification took place within four hours of the events of the preceding evening." Again, these facts, which are supported by competent evidence, when considered in light of the standards set forth in *Neil v. Biggers, supra*, support the conclusion of the trial court that the identification was of independent origin.

[4] Defendant, by his final assignment of error, contends that the trial court erred in denying his motion to allow him to see the report of the witness Bandy. This report was made and reduced to writing by the police, and defendant desired to see the report for purposes of cross-examination. The document complained of was not utilized or introduced in the trial and defendant's counsel made no written request for it prior to trial pursuant to G.S. 15-155.4. Furthermore, the record does not show that the report was material or that it was favorable to the defense, and to allow the defendant to now claim that the failure to produce the report was prejudicial is to embark upon

Potter v. Tyndall

a voyage of speculation. This assignment of error is without merit and thus is overruled.

No error.

Judges BRITT and CARSON concur.

TROY D. POTTER, T/A PAMCO FARM SERVICE COMPANY, PLAINTIFF v. ROBERT TYNDALL, DEFENDANT, v. R. C. NOBLE, LAWRENCE POWELL, AND NA-CHURS PLANT FOOD COMPANY, ADDITIONAL DEFENDANTS

No. 743SC362

(Filed 19 June 1974)

Agriculture § 9— damages from use of fertilizer — statutory prerequisites — inapplicability to action for breach of express warranty

The statute setting forth prerequisites for a "suit for damages claimed to result from use of any lot of mixed fertilizer," G.S. 106-50.7(e) (4), is not applicable to actions for breach of an express warranty of fitness of fertilizer for the purposes for which it was warranted.

APPEAL by defendant Robert Tyndall from *Fountain, Judge*, 4 February 1974 Session of Superior Court held in CRAVEN County.

Heard in the Court of Appeals 10 April 1974.

Appellee Troy D. Potter brought this action to recover \$586.50 on an account. He alleged that appellant Robert Tyndall had bought a large quantity of Na-Churs Plant Food and other fertilizers and had not paid for his purchases.

Appellant Tyndall counterclaimed against Potter and impleaded appellees R. C. Noble, Lawrence Powell and Na-Churs Plant Food Company (hereinafter referred to as Na-Churs) as additional defendants. He alleged that Potter, Noble and Powell had falsely represented to him that Na-Churs Plant Food was a good fertilizer for use on tobacco. In making this representation they were acting as agents of Na-Churs. They told appellant that Na-Churs "maintained a crop service soil testing laboratory through which it could be ascertained exactly what proportion of Na-Churs Plant Food should be applied to the soil when the

Potter v. Tyndall

defendant was transplanting his tobacco from the tobacco bed to the field." Appellant allowed them to take soil samples from his field and send the samples to Na-Churs' laboratory. Na-Churs' laboratory replied and "recommended specific amounts of Na-Churs Plant Food products per acre to be used at planting time in the transplanting solution." Appellant purchased a supply of Na-Churs Plant Food and used the recommended amount when he set out his tobacco. Shortly thereafter, his tobacco plants withered and died, and appellant suffered damages in the amount of \$6,555.74.

Appellees moved for summary judgment dismissing the counterclaim and cross-actions of appellant and submitted affidavits in support of their claim that appellant had not complied with G.S. 106-50.7(e) (4). Appellant submitted an affidavit from the Commissioner of Agriculture of North Carolina, which stated that Na-Churs Plant Food, while registered with the Department of Agriculture as a fertilizer, was not registered as a tobacco fertilizer; that according to information in the Department file, Na-Churs' agents had made statements that it could safely be used on tobacco; that these statements were "incorrect" and might be "misleading and deceptive"; and that the Commissioner was "not in a position to say that Na-Churs Plant Food Company has offered for sale during the 1969 season any kind of dishonest or fraudulent goods."

The court granted the motion of appellees for summary judgment and dismissed appellant's counterclaim and cross-actions.

Ward, Tucker, Ward & Smith, by Michael P. Flanagan, for plaintiff appellee.

Lee & Hancock, by C. E. Hancock, Jr., and Moses D. Lassiter, for defendant appellant Robert Tyndall.

David S. Henderson for additional defendant appellees R. C. Noble and Lawrence Powell.

Barden, Stith, McCotter & Stith, by Laurence A. Stith, and Barnes & Braswell, by Henson P. Barnes, for additional defendant appellee Na-Churs Plant Food Company.

BALEY, Judge.

Appellant contends that appellees misled him by false statements and persuaded him to fertilize his tobacco with Na-Churs

Potter v. Tyndall

Plant Food. Na-Churs Plant Food was not suitable for use on tobacco, and appellant's tobacco plants withered and died. Appellant does not seriously contend that Na-Churs' Plant Food was a defective fertilizer; he admits in his brief that it was an entirely appropriate and safe fertilizer for use on certain crops, but not on tobacco. He contends that his losses were not caused by any inherent defects in the fertilizer, but by appellees' express warranty of fitness of the fertilizer for use on tobacco.

Appellees assert that appellant's counterclaim cannot be maintained, because appellant has not complied with G.S. 106-50.7(e) (4). This section is a part of the North Carolina Fertilizer Law of 1947. It provides:

"No suit for damages claimed to result from the use of any lot of mixed fertilizer or fertilizer material may be brought unless it shall be shown by an analysis of a sample taken and analyzed in accordance with the provisions of this article, that the said lot of fertilizer as represented by a sample or samples taken in accordance with the provisions of this section does not conform to the provisions of this article with respect to the composition of the mixed fertilizer or fertilizer material, unless it shall appear to the Commissioner that the manufacturer of the fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the Commissioner that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods."

Appellees contend that appellant's counterclaim is a "suit for damages claimed to result from the use of any lot of mixed fertilizer" within the meaning of G.S. 106-50.7(e) (4). Appellant contends that his counterclaim is outside the scope of the statute.

Under G.S. 106-50.7(e) (4), before any "suit for damages claimed to result from the use of any lot of mixed fertilizer" may be brought, a litigant must comply with one of three prerequisites: one, obtain a chemical analysis of the fertilizer in question and show that it does not contain the legally required percentages of plant nutrients; two, secure a statement from the Commissioner of Agriculture stating that the fertilizer contained an illegal ingredient; three, have the Commissioner of Agriculture execute an affidavit to the effect that the manufac-

Potter v. Tyndall

turer of the fertilizer "has offered for sale during that season any kind of dishonest or fraudulent goods." It is clear that appellant has failed to comply with any of these three prerequisites, not because of lack of diligence on his part, but because it is impossible for any farmer suffering damages from the breach of an express warranty of fitness to satisfy the requirements of this statute. Appellant admits that Na-Churs Plant Food is a product which meets all legal requirements and is safe for use on certain crops other than tobacco. He does not contend that it contained any illegal ingredient. It is not a defective fertilizer which could be classified as "dishonest or fraudulent goods." But because goods are not inherently dishonest and fraudulent in themselves does not mean that they cannot be sold in a dishonest or fraudulent manner. While in this case, the Commissioner of Agriculture refused to say that the fertilizer constituted "dishonest and fraudulent goods," he did state that the sales representative had made "misleading and deceptive" representations.

For the farmer whose crops are damaged by a defective fertilizer, compliance with G.S. 106-50.7(e) (4) is not excessively difficult; the statute simply requires that he prove his damages in one of three specified ways, rather than in any other way. But for the farmer who loses his crop because of fraudulent misrepresentations by fertilizer salesmen, compliance with G.S. 106-50.7(e) (4) is impossible.

Thus the far-reaching implications of appellees' proposed construction of G.S. 106-50.7(e) (4) become apparent. If the statute is interpreted as applying to cases such as this one, a farmer could not recover damages for breach of an express warranty of fitness for the purpose for which the fertilizer was warranted. So long as his fertilizer is not inherently defective, a manufacturer or seller can make any kind of fraudulent statement about it, without fear of being held liable for damages. In effect, under appellees' interpretation, G.S. 106-50.7(e) (4) gives fertilizer sellers a license to defraud.

Such an unjust construction of the statute should be avoided if at all possible. "It is not the way of the courts to impute to a lawmaking agency" "a purpose and intent so fraught with injustice as to shock the consciences of fair-minded men." *Puckett v. Sellars*, 235 N.C. 264, 268, 69 S.E. 2d 497, 500; *accord*, *Little v. Stevens*, 267 N.C. 328, 148 S.E. 2d 201; *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797; *Kanoy v. Kanoy*, 17 N.C.

Potter v. Tyndall

App. 344, 194 S.E. 2d 201, *cert. denied*, 283 N.C. 257, 195 S.E. 2d 689; *Wagoner v. Butcher*, 6 N.C. App. 221, 170 S.E. 2d 151.

Furthermore, if G.S. 106-50.7(e) (4) is applied to actions for breach of an express warranty of fitness, substantial constitutional questions will arise. It is not clear why sellers of fertilizers should be immunized from liability for breach of an express warranty of fitness, while sellers of other products are not so immunized. Statutory classifications which lack any rational basis violate the equal protection clause of the Fourteenth Amendment. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965); *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18. Statutes should be construed, when possible, in such a way as to avoid serious doubt of their constitutionality. *Education Assistance Authority v. Bank*, 276 N.C. 576, 174 S.E. 2d 551; *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E. 2d 548.

An examination of certain other sections of the North Carolina Fertilizer Law of 1947 lends support to the conclusion that G.S. 106-50.7(e) (4) is not applicable to actions for breach of an express warranty of fitness. Under G.S. 106-50.12 and 106-50.20(3), the making of any "false or misleading" statements or representation concerning fertilizer is punishable as a misdemeanor. These sections clearly show that the legislature was concerned about misrepresentations relating to fertilizer and desired to prohibit them. It would have been highly illogical for the legislature to abolish all civil liability for misrepresentations by fertilizer salesmen, while at the same time making such misrepresentations a criminal offense.

We hold that G.S. 106-50.7(e) (4) does not apply to actions for damages for breach of an express warranty of fitness of the fertilizer for the purposes for which it was warranted. When a litigant alleges that he has been damaged by the use of inherently defective fertilizer, he must comply with one of the prerequisites of the statute. But when the litigant alleges that his losses are the result of false statements concerning fertilizer which constitutes an express warranty of fitness, he is not required to comply.

In his brief, appellant makes clear his contention that his damages were caused by the false statements of appellees, and not by any inherent defects in the fertilizer. At the same time, however, he argues that he is entitled to recover damages for

Holder v. Moore

breach of implied warranty under G.S. 25-2-315; and his pleadings appear to be based on this theory. An action to recover damages for breach of implied warranty is in essence an action based on the inherent defects of the goods. Such an action is within the scope of G.S. 106-50.7(e) (4). (It should be noted that G.S. 25-2-315 does not repeal or limit the scope of G.S. 106-50.7(e) (4), since G.S. 25-2-102 provides that the Uniform Commercial Code does not "impair or repeal any statute regulating sales to . . . farmers.")

Although appellant's pleadings refer to G.S. 25-2-315 relating to implied warranty, in reality his pleadings state a cause of action for breach of *express* warranty under G.S. 25-2-313. Appellant alleges that appellees took soil samples for testing the effectiveness of Na-Churs Plant Food upon his soil when used for production of tobacco and expressly represented to him that it was safe for use in the transplanting of his tobacco. Since an express representation was made, appellant has no need to rely on an implied warranty. Appellant's alleged losses were caused by his reliance on appellees' false representations, and not by any inherent defects of Na-Churs Plant Food. His action is therefore outside the scope of G.S. 106-50.7(e) (4), and he should not be required to comply with that statute.

The Superior Court erred in granting summary judgment against appellant, and its judgment is reversed.

Reversed.

Chief Judge BROCK and Judge PARKER concur.

CATHERINE MARIE HOLDER, BY HER GUARDIAN AD LITEM, LORAINÉ
HOLDER v. JERRY ANN MOORE

* * *

GEORGE A. HOLDER v. JERRY ANN MOORE

No. 7418SC292

(Filed 19 June 1974)

1. Automobiles § 41— child alighting from school bus — duty of driver — instructions

In an action to recover for injuries to the minor child of plaintiff where the evidence tended to show that the child disembarked from a

Holder v. Moore

school bus on a four lane highway divided by a median and crossed three lanes of traffic and the median before being struck by defendant's vehicle, the trial court properly instructed that G.S. 20-217 imposed no duty to stop for a school bus under the facts of this case and correctly instructed that the presence of the school bus and its warning signals was merely another circumstance to consider in determining whether defendant acted as a reasonably prudent person.

2. Automobiles § 63— duty of motorist to anticipate negligence — instructions

In an action to recover for injuries to plaintiff's minor child sustained when she was struck by defendant's vehicle, the trial court properly instructed that a motorist is not required to anticipate negligence on the part of others but is entitled to assume that others will exercise due care to avoid injury to themselves.

APPEAL from *Kivett, Judge*, 4 September 1973 Session of GUILFORD County Superior Court. Argued in the Court of Appeals 7 May 1974.

These actions were instituted by the guardian ad litem of the minor plaintiff and the father of the minor plaintiff for personal injuries, medical expenses, and loss of earnings during minority.

The actions arose out of an automobile accident that occurred on U. S. Highway 29 seven and one-half miles north of Greensboro. Plaintiff, a 13-year-old seventh grade student, had disembarked from a school bus in the northbound lane of a divided highway, crossed the median, and was proceeding to cross the southbound lane when she was struck by defendant's car.

The uncontradicted evidence was that the highway in the vicinity of the accident was four lanes wide and separated by a median 35 to 37 feet wide. The median was covered with grass and sloped from each side to a point in the center that was approximately two feet below the level of the road. The scene of the accident was approximately 1,000 feet south of an overpass at Benaja Road. The overpass is on the crest of a hill, and from the crest of the hill there is an unobstructed view of the highway at the scene of the accident.

The evidence tended to show that the accident occurred during the daylight hours of 29 May 1969 and that the weather was clear and the pavement was dry. The bus driver stopped the bus in the northbound lane and turned on the blinking lights and activated his stop sign. Plaintiff got off the bus, crossed in

Holder v. Moore

front of the bus and ran or walked very fast across the median. At the edge of the median in the inside southbound lane, three cars and a pickup truck had stopped. Plaintiff crossed in front of the first car stopped in the line, and defendant, overtaking the stopped cars in the outside lane, struck plaintiff, hurling her 25 to 30 feet in the air. There was conflicting evidence concerning whether plaintiff stopped and looked before attempting to cross the southbound lanes.

The speed limit on Highway 29 at this point was 60 miles per hour. There was no testimony that defendant was exceeding this posted limit. One witness estimated defendant's speed at 55 to 60 miles per hour, and other witnesses estimated it at a slightly lower speed. Defendant testified that she had been travelling at a speed of 50 miles per hour as she approached the top of the hill near the underpass and that three cars passed her at that point. When she crossed the top of the hill, she observed the same three cars stopped in the left lane. Defendant testified that she observed the school bus on the other side of the median, but it did not have its blinking lights on or its arm out. At that point she slowed down to a speed of 35 to 40 miles per hour. She first saw the plaintiff when she ran out in front of the lead car.

The case was submitted to the jury, which found for defendant. From the signing and entry of judgment, plaintiff appealed.

Robert Cahoon and O'Connor and Speckhard, by Harry O'Connor and Donald D. Speckhard, for plaintiff appellant.

Frazier, Frazier and Mahler, by Harold C. Mahler and Spencer W. White, for defendant appellee.

MORRIS, Judge.

Plaintiff contends that the trial court erred in its instruction by failing to instruct on the duty of care imposed on a motorist to avoid children when he sees or should see a parked school bus with its stop signals fully displayed. We do not agree. The record reveals that the trial court instructed the jury as follows:

"If the defendant could or should have been able to avoid the collision between her car and the child by acting and acting as a reasonably prudent person would have acted under the circumstances, and by reason of her failure to exercise that degree of care the injury to the child was

Holder v. Moore

brought about, then that would constitute negligence on her, the defendant's part, if she failed to exercise that degree of care which a reasonable prudent person would have exercised at the time and place in question.

It is the duty of a motorist in regard to a child on or near the travelled portion of a highway to use proper care in respect to the speed and control of his or her vehicle, maintaining a vigilant lookout and to give timely warning to avoid injury, recognizing the likelihood of a child's acting upon childish impulse, such as running into or across the street or highway.

And he should take that fact into consideration and exercise the care and caution which the circumstances demand if the person either saw or should have seen the child in question or had been alerted to the fact that the child might be in the area.

The duty of a motorist in this respect applies not only to a child whom the motorist sees but also to a child whom the motorist should have seen in the exercise of reasonable vigilance since he or she is charged with seeing what he or she could and should have seen.

The rule of a prudent person applies. There are no degrees of care so far as fixing responsibility for negligence is concerned. . . .

The degree of care owed a child is proportionate to the accountability of a child in view of his or her age, maturity and intelligence to foresee and avoid the perils which may be encountered, if those perils are such as have become apparent to or should have been discovered by the operator of a motor vehicle in the exercise of ordinary care under all of the circumstances. . . .

Now, members of the jury, I instruct you—and this, again, is a summary from the General Statute on the books or in law in this State, Chapter 20, Section 217: Every person using the highways has a duty to stop for a stopped school bus engaged in receiving or discharging passengers therefrom and displaying its mechanical stop signal. And the duty not only is to stop but to remain stopped until that signal being emitted is withdrawn or until the bus has moved on, begun to move on; except that the driver of a

Holder v. Moore

vehicle upon a highway which has been divided into two roadways, so constructed as to separate vehicular traffic between the two roadways by an intervening space, such as a median area, need not stop upon meeting or passing any such bus which has stopped in the roadway across such dividing space.

So, I instruct you that there was no duty insofar as this statute is concerned for the defendant to stop on the south-bound lane; except I instruct you that you may consider the evidence concerning a stopped school bus, if you find such to exist by the greater weight of the evidence, and you may, therefore, consider the evidence concerning the stopped school bus and the emitting therefrom of warning signals, if you find such, for the purpose of helping you ascertain and determine whether the defendant acted as a reasonable and prudent person on the date in question and at the time and place in question, along with all of the other facts and circumstances that were in existence there that confronted the defendant as she was driving south on Highway 29." (Emphasis supplied.)

The trial court declined to give the following instructions requested by the plaintiff.

"[T]hat this is sufficient to constitute a danger signal and give the defendant driver notice that in all probability children were alighting from the school bus and would be on or near the highway as she passed, and placed the defendant driver under the legal duty of proceeding in such a manner and at such a speed as were reasonably calculated to enable her to avoid striking any child who might attempt to cross the highway. . . .

I further instruct you that a school bus while discharging or taking on school children is a warning of danger to automobile drivers. They are afforded by the school bus's very presence, knowledge that children may run across the road in front of their approaching automobile and that they must operate their automobiles with a degree of care consummate with the danger to be encountered . . . and that such increased duty of care upon a motorist under these circumstances may require the motorist to bring her automobile to a complete stop until the danger of injuring a child has passed."

Holder v. Moore

[1] The gist of plaintiff's assignment of error is evidently that the mere presence of the school bus in the vicinity of the accident imposes a greater duty of care than the standard of the ordinary prudent man under like circumstances. The court was correct in its instruction that G.S. 20-217 imposes no duty to stop for a school bus under the facts of this case. There was conflicting evidence on the question of whether the bus lights and blinkers were on at the time of the accident. The trial court correctly instructed in effect that the presence of the school bus and its warning signals were merely another circumstance to consider in determining whether defendant acted as a reasonably prudent man.

[2] Error is likewise assigned to the following portion of the court's instruction:

"I further instruct you that a motorist and also a pedestrian is not or are not required to anticipate negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, is entitled to assume and to act upon the assumption that every other person will exercise due care to avoid injury to himself or herself and others, and will perform his or her legal duty and obey the law."

We hold that this instruction was proper under the decision in *Burns v. Turner*, 21 N.C. App. 61, 203 S.E. 2d 328 (1974), where this Court said:

"A motorist who sees children playing near the highway must drive carefully, keeping in mind that a child may suddenly run out into the road, but he is not an insurer of the safety of children near the highway. *Winters v. Burch*, 284 N.C. 205, 200 S.E. 2d 55." *Id.*, at 63.

[1] There is no merit to plaintiff's assignment of error to the court's instruction on the effect of G.S. 20-217. As we have stated, this statute imposes no duty on a motorist to stop for a stopped school bus across the median from him on a divided highway. Plaintiff contends that this instruction was prejudicial in that it could lead the jury into believing that under no circumstances would defendant have been required to bring his vehicle to a complete stop. Such is not the effect of this portion of the court's instruction. The lengthy portions of the charge which we have hereinabove quoted could leave no doubt in the jurors' minds that defendant was required to exercise whatever

Shaw v. Stores, Inc.

degree of care the circumstances dictated in order to avoid a collision between herself and plaintiff.

We cannot sustain plaintiffs' contention that they were entitled to a mistrial on the ground that counsel for defendant asked the bus driver whether plaintiffs had made a claim against him based on this accident. The evidence was properly excluded on counsel's objection, and plaintiffs could not have been prejudiced.

No error.

Judges CAMPBELL and VAUGHN concur.

MRS. MARY SHAW v. ROSE'S STORES, INC., AND R. M. (FALL) FAW

No. 7412SC254

(Filed 19 June 1974)

False Imprisonment § 2; Libel and Slander § 16— stopping customer to examine sweater — insufficiency of evidence of false imprisonment, slander

Plaintiff's evidence was insufficient for the jury in an action against a department store and its assistant manager for false arrest and slander where it tended to show that immediately after plaintiff left the store the assistant manager requested that plaintiff return to the store so that he could examine the inside of the sweater she was wearing, that plaintiff returned to the store and willingly exhibited the sweater to the assistant manager, that the assistant manager told plaintiff the cashier thought plaintiff had stolen the sweater because it still had a size tag attached to the back of it, and that the assistant manager admitted that the sweater did not belong to the store and returned it to plaintiff.

APPEAL by plaintiff from *Canaday, Judge*, 23 October 1973 Civil Session, CUMBERLAND County Superior Court.

Heard in the Court of Appeals 28 May 1974.

Plaintiff instituted this action to recover compensatory and punitive damages for false arrest and slander.

At the close of the plaintiff's evidence, the defendants moved under Rule 50 of the Rules of Civil Procedure for a directed verdict as to both causes of action. This motion was allowed and plaintiff's action was dismissed.

Shaw v. Stores, Inc.

James R. Nance for plaintiff appellant.

Anderson, Nimocks and Broadfoot by Henry L. Anderson for defendant appellees.

CAMPBELL, Judge.

The plaintiff's evidence, when taken in the light most favorable to the plaintiff, as we are required to do in this situation, establishes:

1. Plaintiff is a deputy sheriff of Cumberland County and acted as the private secretary to the sheriff. She had been employed under three different sheriffs and had been in the Sheriff's Department since 1 August 1955. Her family consisted of a daughter, her husband and an aged aunt of her husband's who lived with the family. On Saturday, 9 October 1971, plaintiff and her aged aunt went to Rose's Store in the Eutaw Shopping Center for the purpose of purchasing some bedroom shoes for another aged aunt who was in a nursing home at the time. They entered the ground floor area about 1:30 p.m. and went directly to the shoe department where they selected a pair of bedroom shoes and two pairs of hose. They did not go by the sweater counter or look at any other merchandise. They were not in the store over twenty minutes. Plaintiff was dressed in a low neck, sunback dress and had a sweater thrown around her shoulders buttoned at the top button only. She did not have her arms in the sweater sleeves and the sweater was just thrown around her shoulders. It was a new sweater which had been purchased in the late spring from another store. Plaintiff had taken the price tag off the sweater at her home but had not noticed that on the right side of the sweater in the back there was a size 34 tag.

2. Plaintiff and her aunt went through the check-out line near the door and paid for the purchases. There were about eight to ten people in the line at the cash register. There were some six or seven cash registers at the check-out counters. Plaintiff and her aunt went outside the store and took about five or six steps going towards where their automobile was parked. As plaintiff turned to see where her aunt was, the assistant manager of the store, the defendant Faw, called to the plaintiff and said, "Lady, I want to see under that sweater." Plaintiff had seen Faw in the store but had never seen him before that time. Plaintiff testified: "[S]o I just flipped it off like that. I said,

Shaw v. Stores, Inc.

'What is this?' He said 'Will you come inside; I want to see inside the sweater.' At that time I was about five or six steps from the left of the door and that would be the east. When he said come with me I went inside." Plaintiff said she went inside because she was afraid not to. At the time Faw spoke to the plaintiff and stopped her on the street, there were some 10 or 15 people going up and down the sidewalk. Plaintiff did not notice any reaction by those people. When she got inside the store, she was directed over towards the cash register. At this time Faw told her that the cashier said that plaintiff had stolen the sweater she was wearing from the store. Faw went ahead and examined the sweater, and at that time the 34 tag was on the sweater and there was nothing else different. The tag was attached by wires stuck through and bent back. Faw admitted that it was not his sweater. Plaintiff picked the sweater up and was getting ready to throw it around her shoulders when Faw caught hold of it and pulled it off and said, "There is the reason she thought you stole it," and Faw pulled the size tag off and threw it on the floor. She testified, "At the time that I had thrown the sweater around by shoulders and he noticed that price tag, he pulled on it there and naturally pulled it off my shoulders—that pulled it off my shoulders and he held it up like that. . . ."

3. After this episode about the sweater, plaintiff informed Faw that she wanted a refund on the merchandise that she had purchased and did not want anything they had. Plaintiff threw the shoes and the hose on the counter. Faw told her that he was sorry and told her to go to the desk over the stairway and sign for it. Plaintiff thereupon went to the rear of the store to the office and found the door locked and after knocking was admitted. Plaintiff inquired as to the name of Mr. Faw and the cashier, Mrs. Pate, and the lady in the office wrote their names down for her. When asked what was wrong, plaintiff said, "I told her that they had accused me of stealing my own sweater and that I wanted to talk to . . . the manager." Plaintiff then called the sheriff's office and talked to a couple of friends in the sheriff's office. Plaintiff testified that at this time she was nervous and crying as she had never been accused of larceny before in her life. From the store the plaintiff went to her home and got in touch with her husband. Plaintiff was made nervous and was unable to sleep for several months and had to take medication for her nervous condition. She did return to her work the following Monday and has worked every day since.

Shaw v. Stores, Inc.

4. At the time of the episode, plaintiff had her badge and pistol with her but was not in uniform. In her occupation plaintiff had had occasion to serve summonses, subpoenas and on occasions had made arrests.

5. Rose's Store is a self-service store, and there are several cashiers with several lines.

6. Numerous witnesses testified in behalf of the plaintiff as to her outstanding reputation and character and that for sometime after this episode she was nervous and upset.

Plaintiff relies upon *Hales v. McCrory-McLellan Corp.*, 260 N.C. 568, 133 S.E. 2d 225 (1963). We think the instant case is clearly distinguishable from the *Hales* case. In the *Hales* case the plaintiff was ordered to come over to a certain place and to wait there. Another employee was directed to call the police, and when the police arrived, plaintiff was taken to the police station where a warrant was issued for her and she was not released until she made bond. As pointed out in the *Hales* case, a jury could infer that the defendants, backed up by the presence and participation of two police officers whom they had called, induced the plaintiff to consider herself under restraint and to believe that any move or attempt on her part to leave the scene would not be allowed. Two of the store's employees, in the presence of police officers, accused the plaintiff of larceny. It was pointed out that a jury might find that she was justified in assuming that she was under involuntary restraint and could further find that the restraint was unlawful.

In the instant case there was nothing to indicate that the plaintiff was under any restraint at any time. She freely and voluntarily went back into the store and received an explanation as to why the cashier assumed she had taken some of the store's merchandise. To say the least, it is somewhat unusual for a person to wear a new garment with tags attached thereto similar to price tags, or in this case a size tag, but obviously a tag not meant to remain with the garment when worn. When the merchandise was examined and ascertained not to have come from the defendant store, an apology was made. From that time on, plaintiff herself published the erroneous accusations.

We think the instant case is much closer to *Black v. Clark's Greensboro, Inc.*, 263 N.C. 226, 139 S.E. 2d 199 (1964). In that case the plaintiff was requested to hand her pocketbook over to the agent of the store who then examined the contents of the

State v. Fowler

pocketbook and requested the plaintiff to remove a bracelet therefrom and hand it to him. The man then examined the bracelet and inquired as to where it was purchased. The bracelet was then returned to her, and the man left. The court stated, "All she did, or was requested to do, was to open her pocketbook and submit it and the bracelet for inspection. The evidence does not disclose that she objected to the examination, but complied willingly." In the instant case the plaintiff was requested to exhibit her sweater, and this she did willingly. After the sweater was examined, it was handed back to the plaintiff with an apology. The plaintiff at all times knew she had not taken any merchandise from the store wrongfully, and the plaintiff had nothing to fear. Furthermore, the plaintiff at the time was a deputy sheriff and had a badge and pistol in her pocketbook. The judgment of dismissal is

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. WILLIAM FOWLER

No. 7412SC26

(Filed 19 June 1974)

1. Animals § 7— cruelty to animal— intent required

To be punishable as a violation of G.S. 14-360, the cruelty to animals statute, defendant's act must be wilful, that is, without just cause, excuse, or justification; therefore, the trial court should have instructed the jury that if it believed the defendant inflicted punishment on his animal in a good faith effort to train him, it should return a verdict of not guilty.

2. Animals § 7— cruelty to animal — exclusion of expert testimony error

In a prosecution under G.S. 14-360 for cruelty to an animal, the trial court erred in excluding testimony of witnesses that defendant's actions involved recognized methods of training dogs, since the qualifications of the witnesses showed that they were experts in the field of dog training.

3. Animals § 7— cruelty to animal — sufficiency of evidence

In a prosecution for cruelty to an animal, defendant was not entitled to nonsuit since the jury was not required to believe his testimony that he held his dog's head in a water-filled hole in an attempt to break the dog of his habit of digging holes in the yard, but could have believed that such action was intended only to torture the dog.

State v. Fowler

ON *certiorari* to review trial before *Braswell, Judge*, 26 February 1973 Session of CUMBERLAND County Superior Court. Argued in the Court of Appeals 19 February 1974.

The defendant was charged in a warrant alleging that he did "unlawfully and willfully and maliciously, cruelly and needlessly beat, torture" a useful animal in violation of G.S. 14-360, a misdemeanor. He was convicted in District Court and given a suspended sentence and fined. An appeal was entered, and trial de novo was held in Superior Court. The defendant was found guilty as charged, and an active sentence was pronounced thereon.

The State's evidence consisted of the testimony of two neighbors of the defendant. Lucille Holleman (Holleman) testified that she lived next door to the defendant. On 16 October 1972, she observed William Fowler beating his dog and tying it up. She called her neighbor, Ingeborg Jenkins (Jenkins), to come see what was happening. From her bedroom she could hear the dog hollering and could see the defendant tying it up. The defendant's wife came out into the defendant's backyard and filled a hole in the ground with water from a hose. Holleman observed the defendant place the dog in the water-filled hole and submerge its head. The defendant would hold the dog's head under for some period of time and then bring the head up. He repeated this process for about 15 to 20 minutes. During this time the defendant's wife kept the hole filled with water. Following this, they untied the dog, hit it once, kicked it once, and tied it to a pole near the water-filled hole.

On cross-examination she testified that she knew that the defendant and his wife were training the dogs. While she did not approve of the method employed, she stated that they loved their dogs very much and looked after them "just about the way some people look after their children."

Jenkins testified that she lived next door to Holleman on the opposite side from the defendant's house. Holleman called her to come to the bedroom window to see what the defendant was doing with his dog. Her testimony was substantially the same as that of Holleman concerning what they witnessed in the defendant's backyard.

The defendant's evidence tended to show that he and his wife were professional dog trainers. The dog involved in the incident in question was a young German shepherd named Ike.

State v. Fowler

Ike had been digging holes in the backyard, and the Fowlers had attempted to stop him from doing this. At first, several less severe measures were tried in an effort to break Ike from digging holes in the yard. All of these methods were unsuccessful. Finally, the defendant used the method described by the prosecuting witnesses. The dog was bound so that he could not cause himself injury by thrashing around, and his mouth was tied closed to prevent him from strangling. The defendant's wife timed the events with a stop watch, and the dog's head was held under exactly forty-five seconds. The dog was submerged twice. When the dog began to strangle on one occasion, the defendant hit him in the chest with his fist to clear his lungs. This method was successful, and Ike was cured of digging holes in the yard.

The defendant offered further evidence, which was not admitted, to explain why he chose this method. Several more lax methods had been tried without success. The defendant would have testified that William Koehler, whom the defendant personally knew, was a famous dog trainer and has various methods of training dogs. The defendant consulted with Koehler, who suggested alternative ways of dealing with the problem. The defendant attempted to place into evidence further matters concerning the Koehler method of dog treatment, but was not allowed even to put these into the record. The defendant's wife, who attempted to qualify as an expert witness, also offered testimony concerning the Koehler method. Again, this was not allowed by the trial court. The defendant had one other witness who was, according to him, an expert in the field of dog training, but she was not allowed to testify concerning the Koehler methods. Had they been allowed to do so, they would have testified that the Humane Society approved the Koehler method.

Attorney General Robert Morgan by Assistant Attorney General H. A. Cole, Jr., for the State.

Doran J. Berry for the defendant.

CARSON, Judge.

The defendant moved for a judgment of nonsuit at the end of the State's evidence and again at the end of all the evidence. He argues that a beating inflicting for corrective or disciplinary purposes without an evil motive is not a crime, even if painful and even if excessive.

State v. Fowler

[1] To be punishable as a violation of G.S. 14-360, the act must first be willful. *State v. Tweedy*, 115 N.C. 704, 20 S.E. 183 (1894). Willful means more than intentional. It means without just cause, excuse, or justification. *State v. Dickens*, 215 N.C. 303, 1 S.E. 2d 837 (1939). New Hampshire, interpreting a cruelty statute similar to that of G.S. 14-360, early noted that punishment administered to an animal in an honest and good faith effort to train it is not without justification and not willful. *State v. Avery*, 44 N.H. 392 (1862). A like construction of our own statute is applicable to the instant situation. The jury, therefore, should have been instructed that if it believed the defendant inflicted the punishment on his animal in a good faith effort to train him, it should return a verdict of not guilty.

[2] Since the intent of the defendant was an essential element to determine willfulness, the trial court committed error in not allowing the defendant to testify as to the Koehler methods of training animals. It was likewise error to refuse to allow the other witnesses of the defendant to give similar testimony. An examination of the qualifications of the witnesses shows that they should have been allowed to testify as experts in the field of dog training.

[3] It does not follow that the defendant was entitled to a nonsuit at the conclusion of the State's evidence and at the conclusion of all the evidence. The jury was not required to believe that the defendant administered the disciplinary measures in an effort to train the animal. The same act committed against the dog for the purpose of torturing it would be within the purview of the statute. However, the jury should have been instructed that if it believed the defendant's evidence, that the punishment was administered for a disciplinary purpose, it should return a verdict of not guilty.

New trial.

Chief Judge BROCK and Judge MORRIS concur.

State v. Sargent

STATE OF NORTH CAROLINA v. WILLIAM FREDRICK SARGENT**No. 7416SC488****(Filed 19 June 1974)****1. Arson § 3— procuring felonious burning — evidence concerning Molotov cocktails and damage**

In a prosecution for procuring the felonious burning of a store in violation of G.S. 14-62, the trial court properly admitted evidence concerning the preparation of Molotov cocktails, the damage caused by the fire at the store and the discovery of a glass jar and gasoline-soaked soil near the store since defendant was charged with complicity in the burning and not with mere solicitation, and it was necessary for the State to prove not only that defendant instructed someone to burn the store but also that the store was in fact burned.

2. Arson § 3— procuring burning of store — reasons another store not burned

In a prosecution for procuring the felonious burning of a store, testimony concerning reasons why the witness and his group did not burn another store was relevant and admissible to explain why defendant changed his plans and told another member of the group to burn the store that was burned after having told the witness to burn the other store.

3. Arson § 3— procuring felonious burning — evidence defendant was AIM member — motive

In a prosecution for procuring the felonious burning of a store, testimony by a participant in the burning that he and defendant were members of the American Indian Movement and came to Robeson county to help the Tuscarora faction establish a tribal identity was admissible when considered with evidence that a building on the campus of Pembroke State University had burned, since it tends to establish that defendant ordered the burning of the store in retaliation for the destruction of a historic building of the Indian community.

4. Criminal Law § 89— prior consistent statements — corroboration

Statements made by a State's witness to a deputy sheriff were properly admitted for the purpose of corroborating the testimony of the witness.

5. Arson § 4; Criminal Law § 106— procuring felonious burning — accomplice testimony — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for procuring the felonious burning of a store notwithstanding the only substantive evidence linking defendant to the fire was the testimony of an accomplice who had pleaded guilty to a charge of felonious burning and was awaiting sentence at the time of defendant's trial.

APPEAL by defendant from *Hall, Judge*, 7 January 1974
Session of Superior Court held in ROBESON County.

State v. Sargent

Heard in Court of Appeals 28 May 1974.

Defendant was indicted for procuring the felonious burning of a grocery store known as Pate's Store, located one mile west of the town of Pembroke. The primary witness for the State at the trial was Lawrence Adolph Blacksmith. Blacksmith testified that he and defendant were members of the American Indian Movement (AIM). Defendant was his superior in the organization. In 1972 Blacksmith, defendant and a number of other AIM members came to Robeson County "to help the Tuscarora Indian faction down here in organizing and see if we could establish a tribal identity for them." On 18 March 1973, Old Main building on the campus of Pembroke State University burned down. Blacksmith testified that he and defendant were on the Pembroke campus that night, and defendant "walked to me and he says, 'Get your people together and start burning.' Then he pointed toward a southeastern section of Pembroke and says, 'Go over there and burn Pate's Store.'" Blacksmith then engaged in a conversation with Roy Lee Deese, Jimmy Deese, Leon Locklear, Rudy Locklear and two other persons. Shortly thereafter, he saw defendant talking to Roy Lee Deese and "heard Sargent say, 'Well, then, start down there, start burning down there,' and he pointed toward the western part of town." Blacksmith then got into a car with Roy Lee Deese, Jimmy Deese, Leon Locklear, Rudy Locklear and Mike Wolf. They carried Molotov cocktails and drove to Pate's Store west of the town of Pembroke. Leon Locklear threw a Molotov cocktail into Pate's Store, and the building burned down. While it burned, Blacksmith and the others drove back to the Pembroke campus. Defendant told Blacksmith that "it was a 'job well done, but I expected the whole town to go up.'" Blacksmith was asked why defendant decided to have Pate's Store west of Pembroke burned, instead of Pate's Store in the southeastern part of town. He replied that the store in the southeastern part of Pembroke could not be ignited by a Molotov cocktail, because it had no windows, was not made of wood, and was surrounded by a chain link fence.

Hubert Stone, a Robeson County deputy sheriff, testified about a statement which Blacksmith made to him. The statement corroborated the testimony given by Blacksmith at the trial. Several other witnesses gave testimony about the fire at Pate's Store.

State v. Sargent

Defendant testified that he was not Blacksmith's superior in the AIM and that he never told Blacksmith or anyone else to burn any building.

The jury found defendant guilty as charged, and he was sentenced to a prison term of 5 to 7 years. He appealed to this Court.

Attorney General Robert Morgan, by Assistant Attorney General Ralf F. Haskell, for the State.

Johnson, Hedgpeth, Biggs & Campbell, by John Wishart Campbell, for defendant appellant.

BALEY, Judge.

[1] During the trial of this case, the State introduced considerable evidence concerning the preparation and use of Molotov cocktails, the damage caused by the fire at Pate's Store, and the discovery of a glass jar and gasoline-soaked soil near the store. Defendant contends that this evidence should not have been admitted, since he was charged only with procuring felonious burning and not with the actual burning of the store. This contention is not correct and must be rejected. When an individual is prosecuted for procuring felonious burning under G.S. 14-62, he is being charged with complicity in the burning and not with mere solicitation. To establish defendant's guilt, it was necessary for the State to prove not only that defendant instructed someone to burn Pate's Store, but also that the store was in fact burned. *State v. Cuthrell*, 233 N.C. 274, 63 S.E. 2d 549; 5 Am. Jur. 2d, Arson and Related Offenses, § 26; *see State v. Benton*, 275 N.C. 378, 167 S.E. 2d 775; *State v. Bass*, 255 N.C. 42, 120 S.E. 2d 580. Evidence of the fire and the events leading up to it, therefore, was as fully admissible as it would have been if one of the principals had been on trial for the actual burning of Pate's Store.

[2] Defendant particularly objects to the admission of Blacksmith's testimony concerning the reasons why he and his group did not burn Pate's Store in the southeastern part of Pembroke. This testimony was relevant and admissible to explain why defendant changed his plans and told Deese to burn Pate's Store west of town after telling Blacksmith to burn the store in southeastern Pembroke. Blacksmith's testimony about defendant's change of plans was more likely to be true if there were a

State v. Sargent

good reason for the change of plans than if there were no such reason.

[3] The court did not err in admitting Blacksmith's testimony that he and defendant were members of AIM and came to Robeson County to help the Tuscarora faction establish a tribal identity. When considered together with the evidence that Old Main burned down on 18 March 1973, this testimony tends to establish a motive for the crime. The jury could reasonably infer that defendant ordered Blacksmith and his group to burn Pate's Store as a means of retaliation for the destruction of one of the historic buildings of the Indian community. *See State v. Jennings*, 16 N.C. App. 205, 192 S.E. 2d 46, *cert. denied*, 282 N.C. 428, 192 S.E. 2d 838; *cf. State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633, *cert. denied*, 409 U.S. 888.

[4] The testimony of Deputy Sheriff Hubert Stone, which corroborated Blacksmith's testimony, was properly admitted into evidence. When a witness is contradicted by other witnesses, or when he is cross-examined in such a way as to cast doubt upon his credibility, evidence of his prior consistent statements is admissible for corroborative purposes. *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104; *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671, *vacated and remanded on other grounds*, 408 U.S. 939; *State v. Netcliff*, 14 N.C. App. 100, 187 S.E. 2d 450; 1 Stansbury, N. C. Evidence (Brandis rev.), §§ 50, 51.

[5] Defendant asserts that the court should have granted his motion for nonsuit, since the only substantive evidence linking him to the fire at Pate's Store was the testimony of the accomplice Blacksmith. This assertion is without merit. "It is well settled in this jurisdiction that although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused." *State v. McNair*, 272 N.C. 130, 132, 157 S.E. 2d 660, 662; *State v. Tilley*, 239 N.C. 245, 249, 79 S.E. 2d 473, 476; *State v. Wood*, 20 N.C. App. 267, 269, 201 S.E. 2d 231, 232. It is true, as defendant points out, that Blacksmith had pleaded guilty to a charge of felonious burning and was awaiting sentence at the time of defendant's trial. This fact, however, does not affect the admissibility of his testimony or its sufficiency to withstand a motion for nonsuit. It was merely a factor to be considered by the jury in determining whether his testimony should be believed.

Swanson v. Swanson

Defendant has brought forward a number of other assignments of error concerning the admission or exclusion of evidence. In no case, however, do we find any error of sufficient significance to be considered prejudicial. The jury chose to believe the State's evidence. Defendant has received a fair trial and must abide by the verdict.

No error.

Judges MORRIS and HEDRICK concur.

JO NEVA SWEM SWANSON AND GEORGE FREDERICK SWANSON
v. FREDERICK JOSEPH SWANSON, DEFENDANT, ROBERT (NMN)
SCHRADER AND FRED A. SCHRADER, ADDITIONAL DEFENDANTS

No. 7425DC44

(Filed 19 June 1974)

1. Infants § 8— child custody proceeding — children in N. C. — jurisdiction of Georgia court

Where two minor children were brought to N. C. from Georgia on 2 April 1973 and a Georgia court subsequently entered an order purporting to award custody of the children to the maternal grandparents on 22 June 1973, the N. C. court which heard the custody matter on 27 June 1973 properly excluded the Georgia order of 22 June 1973, since, at the time the order was entered, the Georgia court did not have jurisdiction of the children.

2. Infants § 8— exercise of jurisdiction by N. C. court — no abuse of discretion

Defendants failed to show an abuse of discretion in the denial of their motion that the N. C. court refuse to exercise jurisdiction in this custody proceeding upon the ground that a court of another state had assumed jurisdiction. G.S. 50-13.5(c) (5).

3. Infants § 9— child custody proceeding — relevancy of evidence

The trial court in this custody proceeding did not err in excluding a complaint and summons in a domestic action between plaintiffs which alleged verbal and physical abuse of the feme plaintiff by her husband, since the evidence would have been of little value in view of the fact that plaintiffs had reconciled their marital difficulties to the point that they were living together and seeking joint, permanent custody of the two minor children.

4. Witnesses § 6— cross-examination as to prior offenses — limitation proper

The trial court did not err in restricting cross-examination of plaintiff-husband as to offenses of which he had been tried and convicted.

Swanson v. Swanson

APPEAL by the additional defendants from *Matheson*, District Court Judge, 30 July 1973 Session of District Court held in CALDWELL County. Argued in the Court of Appeals 19 March 1974.

Prior to 31 March 1973, the defendant, a citizen and resident of Macon, Bibb County, Georgia, defendant's wife, Robbie Dale Schrader Swanson, and two minor children, Nathan Heath Swanson and Shane Allan Swanson, were residing in Macon, Georgia. On 31 March 1973, defendant allegedly murdered his wife and he was incarcerated.

The plaintiffs, parents of the defendant and paternal grandparents of the two minor children, went to Macon, Georgia, on 2 April 1973 where defendant surrendered custody of the children to the plaintiffs. The children have resided with the plaintiffs in Caldwell County, North Carolina, since that time. On 12 April 1973, defendant signed a document whereby he formally relinquished custody of the children to the plaintiffs. On 3 May 1973, the plaintiffs were appointed guardians of the two minor children by the Clerk of Superior Court, Caldwell County.

On 17 May 1973, a hearing was held in the matter of the two minor children in the Juvenile Court of Bibb County, Georgia, to remove custody of the children from the father until all interested parties could be notified of a hearing to determine the custody of the children.

On 13 June 1973, plaintiffs (paternal grandparents) filed a motion for the custody of the children in Caldwell County, North Carolina. The motion was supported by plaintiff's affidavit informing the trial court of the intention of the maternal grandparents to remove the children from North Carolina. Temporary custody was awarded to the plaintiffs pending a final determination after the custody hearing scheduled 27 June 1973.

A motion to intervene was filed by the additional defendants in Caldwell County on 20 June 1973. The additional defendants sought to be made additional parties defendants and cross-claimed for custody of the children in the hearing set for 27 June 1973. The motion to intervene was allowed.

On 22 June 1973, the Juvenile Court of Bibb County, Georgia, entered an order placing the two minor children in the

Swanson v. Swanson

custody of the maternal grandparents (additional defendants in the North Carolina Court).

The hearing in the matter of the custody of the Swanson children was held in Caldwell County, North Carolina, on 27 June 1973. At the hearing, the trial court refused to admit into evidence or recognize a certified copy of the Order of the Juvenile Court of Bibb County, Georgia. The trial court then ruled it would not give full faith and credit to the order of the Juvenile Court of Bibb County.

Judgment was entered on 1 August 1973 awarding custody of the two minor children to the plaintiffs.

The additional defendants appealed to this Court.

Hiatt & Hiatt, by V. Talmadge Hiatt, for the additional defendants.

No appearance contra.

BROCK, Chief Judge.

The additional defendants contend the trial court committed error in refusing to admit into evidence and recognize the order of the Juvenile Court of Bibb County, Georgia, and in failing to give full faith and credit to the Georgia decree.

"[T]he courts of this State will accord full faith and credit to the custody decree of a sister state which had jurisdiction of the parties and the cause as long as the circumstances attending its rendition remain unchanged. However, when a child whose custody is in dispute comes into this State our courts have jurisdiction to determine whether or not conditions and circumstances have so changed since the entry of the custody decree that the child's best interests will be served by a change of custody. (Citations omitted)." *Spence v. Durham*, 283 N.C. 671, 198 S.E. 2d 537.

[1] The record fails to disclose that the Juvenile Court of Bibb County, Georgia properly acquired jurisdiction of the children. The North Carolina Court had jurisdiction over the two minor children when the plaintiffs brought the children from Bibb County, Georgia to Caldwell County, North Carolina, on 2 April 1973. The first assertion of jurisdiction of the children by the Georgia Court, as disclosed by the record on appeal, was a hearing commenced there on 17 May 1973. This was more than

Swanson v. Swanson

a month after the children were brought to North Carolina and fourteen days after the North Carolina Court had appointed plaintiffs guardian of the two children. The next assertion of jurisdiction by the Georgia Court was on 22 June 1973 when it entered an order purporting to award custody of the children to the maternal grandparents (additional defendants in the North Carolina Court). The children were not within the State of Georgia on either of these dates and could not, therefore, properly be deemed to be within the jurisdiction of the Juvenile Court of Bibb County. The Georgia Court, being without jurisdiction of the children, its decree was properly excluded by the North Carolina Court.

[2] Defendants also contend that the trial court committed error in denying their motion that the North Carolina Court refuse to exercise jurisdiction upon the ground that a court of another state had assumed jurisdiction. G.S. 50-13.5(c) (5) grants to the North Carolina courts the discretion of either refusing to exercise jurisdiction or retaining jurisdiction when it is determined that a court of another state has assumed jurisdiction. No abuse of discretion is alleged or shown. This assignment of error is overruled.

[3] The additional defendants contend the trial court committed error in refusing to admit into evidence the complaint and summons in a domestic action between the plaintiffs. The excluded complaint alleged verbal and physical abuse of the *feme* plaintiff by her husband.

The trial court in its findings of fact and conclusions of law found that the plaintiffs were living together in the same household, both plaintiffs desiring permanent custody of the minor children. The introduction of the evidence excluded would have had little probative value in view of the fact that plaintiffs had reconciled their marital difficulties to the point that they were living together in the same household and seeking joint, permanent custody of two minor children. This assignment of error is overruled.

[4] The additional defendants contend the trial court committed error in terminating cross-examination of the plaintiffs as to personal matters and offenses of which plaintiff-husband had been tried and convicted.

The record reveals that plaintiff-husband testified that he had been convicted of driving under the influence. "[F]or pur-

State v. Russell

poses of impeachment, a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *indicted* or is *under indictment* for a criminal offense other than that for which he is then on trial." *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174. The trial court acted properly in restricting the questioning to offenses of which the plaintiff had been convicted.

We have examined additional defendants' exceptions to the rulings of the court upon cross-examination of the plaintiff. Without detailing the questions to which objections were sustained, we hold that the questions were improper either in substance or in form. In our opinion, the rulings of the trial judge were correct.

The judgment appealed from is

Affirmed.

Judges PARKER and BAILEY concur.

STATE OF NORTH CAROLINA v. FRANKIE EUGENE RUSSELL
AND JAMES L. TATUM

No. 7419SC263

(Filed 19 June 1974)

1. Criminal Law § 66— in-court identification of defendants — failure to make findings on *voir dire* — no error

The trial court did not err in allowing an in-court identification of defendants, though the court failed to make findings of fact following a *voir dire*, since the evidence on *voir dire* was not conflicting.

2. Criminal Law § 84; Searches and Seizures § 1— warrantless seizure of items in plain view — admissibility

The trial court properly denied defendant's motion to suppress evidence seized from defendant's car and properly denied defendant's request for a *voir dire* on the admissibility of the evidence where the evidence before the court indicated that items seized from the car were taken without a warrant but were in plain view of officers.

3. Robbery § 4— robbery of service station attendant — sufficiency of evidence

Evidence in an armed robbery case was sufficient to be submitted to the jury where it tended to show that three men in a 1968 gold Dodge drove into the victim's service station and requested work on

State v. Russell

the car's ignition switch, that one man held a sawed-off rifle on the victim while the others took money and a radio, that officers stopped a 1968 gold Dodge with three men in it shortly after the robbery, that a sawed-off rifle, a radio, and currency were found in the vehicle, and that the victim identified two of the men in the vehicle as the robbers.

ON *certiorari* to review a trial before *Armstrong, Judge*, 29 May 1973 Session of Superior Court held in ROWAN County. Heard in the Court of Appeals 14 May 1974.

Defendants were charged in separate bills of indictment with the felony of armed robbery. The two cases were consolidated for trial.

The State's evidence tends to show that on 26 April 1973, Elbert Grady Turner was robbed of \$253.35 and one AM-FM radio valued at \$60.00 at his place of employment, Wilhoit's Texaco Service Station, in Rowan County, North Carolina. Turner stated that there were three men in a 1968 gold Dodge that drove into his service station and requested work to be done on the ignition switch. Turner identified defendants Russell and Tatum as two of the three men in the car, and further identified defendant Tatum as the man who held a .22 caliber sawed-off rifle on Turner during the robbery.

Michael Basinger arrived at the service station at the time of the robbery and observed three black men getting into the Dodge and leaving at a high rate of speed. Turner informed Basinger of the robbery and called the police.

In response to a call to be on the lookout for the particular vehicle, Deputy Sheriff Sloop stopped the 1968 two-door hardtop gold Dodge containing three black males. In the process of asking for the driver's license and registration, Deputy Sloop observed a partially-covered firearm on the lap of one of the men in the back seat. The three were placed under arrest and taken to the North Kannapolis jail where Elbert Turner identified the two defendants.

Prior to the preliminary hearing, Turner and Basinger were shown four photographs of four black men. Turner identified three of the four photographs as being the robbers, two of the three photographs being photographs of the defendants. Basinger could only positively identify defendant Russell's photograph from the group of four.

The defendants offered no evidence.

State v. Russell

From verdicts of guilty and judgment entered thereon, defendants appealed to this Court.

Attorney General Morgan, by Assistant Attorney General Jones, for the State.

J. Stephen Gray, for the defendant Russell.

Richard F. Thurston, for the defendant Tatum.

BROCK, Chief Judge.

Defendants contend the trial court committed error in concluding as a matter of law that the in-court identification of the defendants was proper.

[1] Defendants first argue that the trial court committed error in failing to make specific findings of fact following a *voir dire*. While defendants admit there was an extensive *voir dire* conducted in regard to witness Turner's identification, defendants contend the trial court made no findings of fact to support its conclusion of law that the identification procedure was based upon observation of the defendants at the scene of the robbery, and not identification made at the North Kannapolis Police Station.

The witnesses Turner and Basinger testified that they had observed defendants at the scene of the robbery for a period of time which would allow them to unequivocally state that the identification of the defendants during the trial was based upon observations made at the scene, and not upon observation of the defendants at the police station on the date of the robbery, nor upon random selection of photographs of defendants prior to the preliminary hearing. No conflicting evidence was offered.

In the absence of conflicting evidence at the *voir dire*, it is not required of the trial judge to make findings of fact and enter them in the record, although it is a better practice. The failure of making such findings will not be deemed prejudicial error. *State v. Gurkins*, 19 N.C. App. 226, 198 S.E. 2d 448.

[2] Defendants contend the trial court committed error in allowing into evidence articles seized from defendants' car after it was stopped by Deputy Sloop. They also contend that a *voir dire* should have been held before admitting evidence seized in a search of defendants' car.

State v. Russell

The evidence seized from defendants' vehicle consisted of a sawed-off .22 caliber rifle, an AM-FM radio belonging to witness Turner, and a blue cap worn by witness Turner prior to the robbery. The description of the vehicle employed at the robbery scene matched that of defendants' vehicle in detail. When Deputy Sloop, who was on the lookout for such a vehicle, observed and stopped the vehicle, there was sufficient probable cause to suspect that this vehicle was the one used in the robbery.

After the vehicle was stopped, Deputy Sloop observed the sawed-off .22 rifle in the lap of one of the occupants of the back seat. The defendants and the other male were then requested to sit in the deputy's vehicle until the North Kannapolis police arrived. In attempting to cut off the engine in the then-abandoned car, Officer Sloop found witness Turner's cap on a seat of the car. The hat contained a large amount of currency. The ignition switch and wiring in defendants' car had been removed from its proper place and was lying on the dash. The officers were unable to stop the engine. The vehicle was driven by an officer to the North Kannapolis Police Station, and as Officer Smith was assisting in efforts to stop the engine, he observed Turner's radio sitting on the back seat of the defendants' car.

It is not clear from the record that defendants were placed under arrest by Deputy Sloop when he requested them to sit in his vehicle until the North Kannapolis officers arrived. Conceding, however, that an arrest was made by Deputy Sloop without a warrant, G.S. 15-41 states that a peace officer may without warrant arrest a person when he has reasonable ground to believe the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody. From the evidence then before the Court, it was clear that the Deputy had reasonable grounds to believe that defendants had committed the felony of armed robbery. The evidence showing reasonable grounds to arrest was already before the court. Therefore, a *voir dire* to determine the validity of the arrest was not necessary. A warrantless search of the vehicle under these same circumstances would have been justified. However, it seems that no search was conducted; the evidence seized was in clear view of the officers. Therefore, a *voir dire* to determine the validity of the search was not necessary. The trial judge was correct in denying the motion to suppress the evidence, and in denying defendants' request for a *voir dire*.

Lachmann v. Baumann

[3] Defendants contend the trial court erred in failing to dismiss at the close of State's evidence and at the close of all the evidence.

Motion to nonsuit requires the court to consider the evidence presented in the light most favorable to the State and take it as true, giving the State every reasonable intendment and inference to be drawn therefrom. We find there was sufficient evidence presented to require submission of the case to the jury. This assignment of error is overruled.

We have reviewed the trial judge's instructions to the jury and, in our opinion, the jury was instructed upon the applicable principles of law. We find no prejudicial error in the charge.

No error.

Judges CAMPBELL and BRITT concur.

DR. VERA R. LACHMANN v. ELIZABETH S. BAUMANN, EXECUTRIX
OF THE ESTATE OF FRED C. BAUMANN, AND ELIZABETH S. BAUMANN,
INDIVIDUALLY

No. 7424DC257

(Filed 19 June 1974)

1. Boundaries § 15— boundary dispute — adverse possession — superior title from common source

In an action to establish the true boundary line between the lands of plaintiff and defendants, the evidence was sufficient to support the trial court's determination that plaintiff held title to the land in controversy by reason of her adverse possession of the land for a period of twenty years and by reason of her showing of superior title to the land from a common source.

2. Boundaries § 14— boundary dispute — plat from court survey

In an action to establish the true boundary line between the lands of plaintiff and defendants, the trial court did not err in admitting the plat made from a survey of the lands ordered by the court and in permitting the witnesses to testify by referring to the plat.

3. Appeal and Error § 37— inability to obtain verbatim transcript — agreed case on appeal

Appellants are not entitled to a new trial by reason of their inability to obtain a verbatim transcript of the trial because the court reporter was unable to record the testimony in shorthand and her tape recorder was not working properly where the case on appeal was agreed upon by counsel for the parties.

Lachmann v. Baumann

APPEAL by defendants from *Briggs, District Court Judge*, 29 August 1973 Session of District Court held in WATAUGA County. Argued in the Court of Appeals 20 March 1974.

The record on appeal was agreed upon by counsel on 14 January 1974 and docketed in this Court on 23 January 1974. Mr. Fred C. Baumann, one of the defendants, died on 17 January 1974. Letters Testamentary were issued, on 8 March 1974, to Elizabeth S. Baumann as Executrix of the Estate of Fred C. Baumann. By Order entered in this Court, on 14 March 1974, said Executrix was substituted as a party defendant in the place of Fred C. Baumann.

Plaintiff instituted this action seeking: (1) an order declaring plaintiff to be the owner of the land described in the complaint; (2) an order restraining defendants from cutting shrubbery and trees and otherwise trespassing on plaintiff's property; and (3) damages from the past trespasses.

Defendants admitted plaintiff's ownership of the land described in the complaint, but denied they had trespassed thereon. Defendants asserted ownership of the land described in their answer and alleged the shrubbery and trees were cut by them from their own property.

The Court ordered a survey of the contentions of the parties. The plat prepared under the Court Order was used in evidence upon trial, and is now recorded in Watauga County in Plat Book 7, at page 84.

Plaintiff's title and defendants' title derive from a common source, and plaintiff's land and defendants' land have a common dividing line. Plaintiff's land lies generally south of defendants' land. Defendants' land lies generally north of plaintiff's land. The dividing line as contended by plaintiff is shown on the plat by a red line (from point red A to point red B) and lies approximately 322 feet north of the dividing line as contended by defendants. The dividing line as contended by defendants is shown on the plat by a green line (from point green A to point green B) and lies approximately 322 feet south of the dividing line as contended by plaintiff. The area in dispute is an approximate rectangle measuring north-south approximately 322 feet, and measuring east-west approximately 861 feet.

The trial judge, sitting without a jury, decreed that the northern border of plaintiff's land was the red line shown on

Lachmann v. Baumann

the plat (from point red A to point red B), and that the southern border of defendants' land was the red line shown on the plat. Thus, the trial court held that the true dividing line between plaintiff's property and defendants' property was the line as contended by plaintiff. The Court awarded damages to plaintiff for the trespass by defendants upon plaintiff's land lying between the red line and green line shown on the plat.

Defendants appealed.

Holshouser & Lamm, by J. E. Holshouser, Sr., for plaintiff.

Townsend & Todd, and L. H. Wall, by Bruce W. Vanderbloemen, for defendants.

BROCK, Chief Judge.

[1] Plaintiff offered evidence which tended to establish, by two of the long approved methods, her title to the land in controversy. (1) She offered evidence tending to show open, notorious, continuous adverse possession under known and visible lines and boundaries for twenty years. (2) She offered evidence tending to connect plaintiff and defendants with a common source of title and to show in herself a better title from that source. *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142. See G.S. 1-36 for elimination of need to show title out of the State.

Plaintiff also offered evidence which tended to establish her title by the long approved method of showing open, notorious, continuous adverse possession under known and visible lines and boundaries and under color of title, for seven years. However, in finding of fact number 11, the trial judge did not find that her possession under this method was under known and visible boundaries. See G.S. 1-38(a); *Barringer v. Weathington*, 11 N.C. App. 618, 182 S.E. 2d 239. Therefore, plaintiff's evidence under this method of showing title availed her nothing.

Nevertheless, either finding of fact number 10 or finding of fact number 12 is sufficient to support the judgment. In finding number 10, the trial judge found as a fact "that plaintiff and her predecessors in title have been in the actual, notorious, adverse, continuous and peaceable possession under known and visible lines and boundaries for more than twenty years prior to the institution of this action of the land" in controversy. In finding of fact number 12, the trial judge found as a fact "that plaintiff and the defendants hold their respective tracts of land

Miller v. Kennedy

from a common source of title and that plaintiff has the superior and better title of all lands in controversy in this action." In our opinion, there was adequate, competent evidence to support both of these findings of fact.

[2] Defendants assign as error that the trial judge admitted into evidence the plat made from the survey of the lands ordered by the Court, and in permitting the witnesses to testify by reference to the plat. The procedure followed by plaintiff in the identification of the plat and the introduction of the plat into evidence were proper. We see no merit in defendants' arguments about witnesses being allowed to testify by reference to the plat.

[3] Defendants state in their brief that the main thrust of their appeal is their inability to obtain a verbatim transcript of the testimony of the witnesses. It appears from the record on appeal that the Court Reporter was unable to record the testimony in shorthand and that her tape recorder was not working properly. She states by affidavit that she is "unable to furinsh any portions of the testimony." Based upon this affidavit, defendants made a motion to the trial judge for a new trial. The motion was denied with the following comment: "... [T]he Court is of the opinion that the case on appeal in this case can be prepared and agreed upon or settled by the Court. . . ." Indeed, the case on appeal was agreed upon by counsel, without resort to the trial judge for settlement. We are not inclined to disturb that agreement.

The judgment appealed from is

Affirmed.

Judges PARKER and BAILEY concur.

TERRY LYNN MILLER, MINOR, BY HIS NEXT FRIEND, CHARLIE MILLER v. HAROLD WAYNE KENNEDY, MICHAEL ALLEN KENNEDY, JERRY DAVID KENNEDY AND GLENDA HOLDEN KENNEDY

No. 7419SC343

(Filed 19 June 1974)

1. Automobiles § 46— opinion testimony— speed of automobile and bicycle

In an action growing out of an automobile-bicycle collision, a passenger in the automobile who testified the bicycle was 100 feet from

Miller v. Kennedy

the automobile when he first saw it was qualified to give opinion testimony as to the speed of the automobile and the speed of the bicycle.

2. Rules of Civil Procedure § 26; Witnesses § 5— exclusion of depositions offered for corroboration

The trial court did not err in the exclusion of the 1969 depositions of the minor plaintiff and his father which were offered for the purpose of corroborating their testimony at the trial. G.S. 1A-1, Rule 26(d).

APPEAL by plaintiff from *Exum, Judge*, 24 September 1973 Session of Superior Court held in RANDOLPH County.

This is a civil action, instituted on 21 October 1968, in which plaintiff seeks to recover for extensive personal injuries sustained in a collision between a bicycle operated by plaintiff and an automobile operated by defendant Harold Kennedy and belonging to certain other defendants. The collision occurred on Rural Paved Road 1564 in Randolph County during daylight hours on 3 May 1967, at which time plaintiff was nine years old. The evidence showed that at the time of the collision the bicycle was proceeding south on said highway and the automobile was proceeding north. The speed limit was 55 m.p.h.

The first two issues submitted to the jury related to negligence of the operator of the automobile and contributory negligence of plaintiff. The jury answered the issue of negligence in favor of plaintiff and the issue of contributory negligence in favor of defendants. From judgment entered on the verdict, denying plaintiff any recovery, he appealed.

Ottway Burton for plaintiff appellant.

Henson, Donahue & Elrod, by Perry C. Henson and Sammy R. Kirby, for defendant appellees.

BRITT, Judge.

Although plaintiff has not properly grouped his exceptions and presented questions of law as required by the rules of this court, we have, nevertheless, considered all exceptions brought forward and argued in his brief. We will discuss only the exceptions that appear to be of primary importance.

[1] Plaintiff assigns as error the admission of testimony of defendant Michael Kennedy, who was riding in the automobile, to the effect that immediately prior to the collision, in his opinion, the automobile was traveling between 45 and 50 m.p.h. and

Miller v. Kennedy

the bicycle between 20 and 25 m.p.h. Plaintiff argues that since the witness testified that the bicycle was only 100 feet from the automobile when he first saw it, the witness was not qualified to give an opinion as to speed. The assignment has no merit.

The opinion of the witness as to the speed of the automobile clearly was admissible. The witness had ample opportunity to observe the speed of the automobile; the extent of his observation affects only the weight, and not the competency, of the testimony. *Lookabill v. Regan*, 247 N.C. 199, 100 S.E. 2d 521 (1957); *State v. Woodlief*, 2 N.C. App. 495, 163 S.E. 2d 407 (1968). 1 Stansbury's N. C. Evidence, Brandis Revision, § 131.

Regarding the opinion of the witness as to the speed of the bicycle, it has been held that observance of a vehicle for 50 feet was not too brief for a witness to state his opinion as to the vehicle's speed. *Ray v. Membership Corp.*, 252 N.C. 380, 113 S.E. 2d 806 (1960). See also, *Herring v. Scott*, 21 N.C. App. 78, 203 S.E. 2d 341 (1974). We adhere to those decisions.

[2] Plaintiff assigns as error the refusal of the court to allow him to introduce into evidence the adverse examination of plaintiff and deposition of his father, taken on 17 October 1969. Plaintiff and his father testified at the trial, and plaintiff contends the adverse examination and deposition were admissible to corroborate their testimony. We find no merit in the assignment.

At the outset of our discussion of this assignment, we point out that under the new Rules of Civil Procedure, effective 1 January 1970 and applicable to litigation pending on that date, (Ch. 954, 1967 Session Laws as amended by Ch. 803, 1969 Session Laws), what was formerly referred to as an adverse examination is now a deposition. G.S. 1A-1, Rule 26. Therefore, hereinafter we will refer to plaintiff's adverse examination as a deposition.

First, we consider the assignment in the light of authorities applicable prior to 1 January 1970, the effective date of the new rules. In *Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196 (1953), the court held that application of the rules regulating the reception and exclusion of corroborating evidence, so as to keep its scope and volume within reasonable bounds, necessarily rests in large measure in the discretion of the trial judge. In *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529 (1968), the court held that the exclusion of the adverse examination of a

Miller v. Kennedy

party was not error when it appeared that the party testified to the same import at the trial; that it was within the sound discretion of the trial judge to stop the time-consuming and tedious process of reading the questions and answers in the adverse examination. Applying authorities predating 1 January 1970 to the question at hand, after reviewing the testimony of plaintiff and his father provided at the trial, and comparing that testimony with that contained in their depositions, we conclude that the trial judge did not abuse his discretion in excluding the depositions.

We now consider the assignment in the light of G.S. 1A-1, Rule 26, which currently governs the taking and use of depositions. Pertinent portions of Rule 26 reads as follows:

“(d) Use of depositions.—Any part or all of a deposition, so far as admissible under the rules of evidence, may be used at the trial . . . against any party who was present or represented at the taking of the deposition or who had due notice thereof, as follows:

(1) When the deponent is a party adverse to the party offering the deposition in evidence or is a person who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership, or association which is a party adverse to the party offering the deposition in evidence, the deposition may be used for any purpose, whether or not deponent testifies at the trial or hearing.

(2) When the deponent testifies at the trial or hearing, the deposition may be used

a. By any party adverse to the party calling deponent as a witness, for the purpose of impeaching or contradicting the testimony of deponent as a witness, or as substantive evidence, and

b. By the party calling deponent as a witness, as substantive evidence of such facts stated in the deposition as are in conflict with or inconsistent with the testimony of deponent as a witness.”

Subsection (d) (3) of the Rule then provides for the only other instances in which the deposition may be used, and “for purpose of corroboration” is not one of them.

State v. Buchanan

Therefore, we hold that under the new rules, as applied to the facts appearing in this case, the trial court did not err in refusing to admit the depositions into evidence.

A review of the record with respect to the other assignments of error argued in plaintiff's brief impels us to conclude that they too are without merit. We hold that plaintiff received a fair trial, free from prejudicial error.

No error.

Chief Judge BROCK and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. KESTER WAITS BUCHANAN

No. 7425SC390

(Filed 19 June 1974)

1. Criminal Law § 64— opinion testimony as to intoxication — admission proper

Defendant was not prejudiced by the admission of an officer's opinion testimony as to whether defendant had drunk a sufficient quantity of intoxicating beverage to cause him to lose normal control of his bodily or mental faculties.

2. Criminal Law § 97— introduction of additional evidence — cross-examination of witness denied — no error

The trial court did not abuse its discretion in allowing the State to reopen its case to present additional evidence as to whether defendant's condition resulted from injuries he received in an accident or from his having drunk intoxicating beverages, nor did the court err in refusing to allow defendant to recall a State's witness for cross-examination.

3. Arrest and Bail § 3; Automobiles § 125— drunken driving — legality of warrantless arrest

Defendant in this drunken driving case was not entitled to nonsuit based on the illegality of his arrest where the evidence tended to show that he was seated under the wheel of his car when an officer approached him, defendant stated that he had been driving and that he did not want to take the breathalyzer test because he had been drinking for two days, and a warrant for drunken driving was issued on the date of the occurrence based upon the affidavit of the arresting officer.

APPEAL by defendant from *Winner, Judge*, 25 October 1973 Session, Superior Court, BURKE County. Heard in the Court of Appeals 23 April 1974.

State v. Buchanan

In District Court, defendant was tried for and convicted of driving under the influence of intoxicating liquor and public drunkenness. On appeal to Superior Court, the public drunkenness charge was nonsuited at the close of the State's evidence, and defendant was convicted by the jury of driving under the influence. From judgment entered on the verdict, he appealed.

Attorney General Morgan, by Associate Attorney Wallace, for the State.

Hatcher, Sitton and Powell, by Steve B. Settlemyer, for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the trial court erred when it allowed certain evidence in "over defendant's objection." The solicitor had asked the officer whether he had an opinion satisfactory to himself whether on the occasion in question the defendant had drunk a sufficient quantity of intoxicating beverages to cause him to lose "the normal control of his bodily or mental faculties or both to such an extent that there was an appreciable impairment of either or both of these faculties." The court overruled defendant's objection to the question and also his objection to the question "What is your opinion?" The witness answered the question and there was no motion to strike the answer. Defendant concedes the question was in proper form, but, on appeal, raises objection to the answer because it did not "conform to the definition" and was, therefore, not responsive. Even had defendant properly moved to strike the answer, as he should have done, *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966), the court's denial of his motion would not have constituted error.

[2] Defendant next contends that the court committed reversible error when it "directed" the State, after motion for nonsuit and argument thereon, to reopen its case and allow the arresting officer to testify whether in his opinion the condition the officer observed with respect to defendant was caused by injuries received by defendant or by his having drunk some intoxicating beverage. After the State rested, defendant again moved for judgment as of nonsuit, which was denied. He then requested permission to recall a State's witness for further cross-examination. The court refused to allow him to be recalled for cross-examination but agreed that defendant could call the witness as

State v. Buchanan

his own witness. This defendant did not desire to do. Defendant candidly concedes that the trial judge has wide discretion in allowing the reopening of a criminal case for the introduction of further evidence. This is within the discretion of the court even after both parties have rested and the jury has retired and commenced its deliberations. *State v. Shutt*, 279 N.C. 689, 185 S.E. 2d 206 (1971). Although defendant uses in his brief the word "directed," the record indicates that the court noted that there was a problem in the evidence in that the court could not see how the jury could be informed sufficiently to determine whether defendant was under the influence of an intoxicant or whether the injuries he had just sustained had caused the condition. There was no direct evidence of injury. However, there was evidence that defendant said he had a limp and that his car had hit a telephone pole which broke and fell over the grille of the car. There was also evidence that defendant told an officer that he did not receive a bump on the head, but that the officer did not ask defendant whether he received "bumps" on or about the chest. After defendant moved for judgment of nonsuit, and the court made its observation noted above, the court said "I am going to allow the State to re-open its case and ask that question; then I will rule on it." After the officer testified, the court denied defendant's motion. See *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E. 2d 708 (1940), where after defendant moved for judgment as of nonsuit and the court allowed the motion, the court stated: "There is a serious defect in the record. If you want to re-open and introduce that the court will allow you to do so." Justice Barnhill (later C.J.) said for the Court that "[i]t is altogether discretionary with the presiding judge whether he will re-open the case and admit additional testimony after the conclusion of the evidence and even after the argument of counsel. (Citations omitted.) When the ends of justice require this may be done even after the jury has retired. (Citations omitted.)" *Id.* at 150. This same discretion extends and applies to defendant's request to recall a State's witness for cross-examination. The court was willing to allow defendant to reopen its case and call the witness as his witness. The defendant chose to retain his advantageous position in arguments to the jury. He had no right to have the regular order of calling witnesses and cross-examining them varied. 1 Stansbury, N. C. Evidence. Brandis Revision, Witness, § 24, p. 58. We are unable to say that the court abused its discretion in either ruling of which defendant complains.

State v. Buchanan

[3] By his third assignment of error defendant urges that he was entitled to a judgment as of nonsuit because the evidence showed the arresting officer never observed the defendant driving a vehicle and never served him with a valid warrant charging him with drunken driving. It appears that defendant is contending that defendant was illegally arrested. It is axiomatic that "if a defendant is physically before the court on an accusatory pleading, . . . the invalidity of the original arrest is immaterial, even though reasonably raised, as regards the jurisdiction of the court to proceed with the case." *State v. Mobley*, 273 N.C. 471, 473, 160 S.E. 2d 334 (1968), quoting 21 Am. Jur. 2d, Criminal Law, § 380.

Here, the officer arrested defendant for public drunkenness, which charge was not pressed in Superior Court. The defendant, who was seated under the steering wheel of his car when the officer drove up, stated that he was driving and on his way to Morganton and had left Valdese at one o'clock. Defendant further stated to the officer that he did not want to take the breathalyzer test because he had been drinking for two days and it might register too much. The record does not contain a warrant for public drunkenness but it does contain a warrant, proper in form, issued on the date of the occurrence by a magistrate, upon the affidavit of the officer who arrested defendant for public drunkenness, for driving under the influence. At no point at the trial of the cause did defendant raise any objection to the warrant other than that it did not charge a criminal offense, which objection was properly overruled and defendant did not except. The procedure followed by the officer was approved in *State v. Gaddy*, 14 N.C. App. 599, 188 S.E. 2d 745 (1972). This assignment of error is overruled.

Defendant does not assign error to any portion of the charge of the court, and it is not a part of the record.

We have considered all of defendant's contentions and find them to be without merit. Defendant received a fair and impartial trial, free from prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

State v. Crews

**STATE OF NORTH CAROLINA v. JERRY MILTON CREWS
AND DEBORAH LEIGH PARRISH**

No. 7421SC294

(Filed 19 June 1974)

1. Narcotics § 3; Searches and Seizures § 1— warrantless seizure of bottle of amphetamines — admissibility of evidence

In a prosecution for possession of amphetamines the trial court did not err in allowing into evidence a bottle of pills seized without a warrant from defendant's closet shelf where officers were in defendant's apartment to serve a capias on him and the bottle of pills was visible to the officers before defendant entered the closet and turned on the light.

2. Searches and Seizures § 3— bottle of amphetamines in plain view — probable cause for issuance of search warrant

Where officers lawfully but without a warrant seized a bottle of amphetamines from defendant's apartment, probable cause existed for the issuance of a warrant to search the apartment, and a box of several thousand pills found pursuant to the warrant was properly admitted into evidence.

APPEAL from *Wood, Judge*, 27 August 1973 Session of FORSYTH County Superior Court. Argued in Court of Appeals 6 May 1974.

Defendants were charged with possession of amphetamines, and their cases were consolidated. After a jury was empanelled, each defendant entered a plea of not guilty and moved to suppress the evidence seized from their apartment.

On voir dire, the State presented evidence tending to show that they went to the apartment of Jerry Milton Crews to serve a capias on him for failure to appear in court. The officers rang the doorbell and knocked on the door. The door was answered by a Miss Beverly Wall who informed the officers that Crews was in a bedroom in the rear of the apartment. The officers proceeded to the bedroom, entered the room, turned on a light, and informed the occupants of the room that they had a capias for Jerry Milton Crews. The occupants of the room—defendants Crews and Parrish—were in bed, and the police officers

State v. Crews

informed Crews that he must accompany them to the police station. Crews got out of bed and put on a pair of shorts which was lying on the floor next to the bed. Crews headed toward the bedroom closet, the door to which was open, and as one of the officers looked in that direction, he spotted a brown tinted bottle containing a large quantity of pills.

Crews entered the closet and turned on the light. Officer Spillman followed him and took the bottle from the shelf. Both officers had been trained in drug identification, and both were of the opinion that the pills contained amphetamines.

The officers took defendant Crews to the police station, and they also took the bottle of pills. The narcotics agent who made preliminary tests on the pills determined that they were amphetamines. Officer Spillman thereupon obtained an arrest warrant for possession of amphetamines and a warrant to search the apartment for other narcotics. The officers returned to the apartment and seized a cardboard box containing several thousand pills similar to those in the brown bottle. These pills were found in a box under the bed previously occupied by defendants.

The evidence thus seized was admitted over defendants' objection, and the jury returned a verdict of guilty as charged as to both defendants. From the entry and signing of judgment, defendants appealed.

Attorney General Morgan, by Assistant Attorney General Matthis, for the State.

Roberts, Frye and Booth, by Leslie G. Frye and Gary W. Williard, for defendant appellants.

MORRIS, Judge.

Defendants assign error to the introduction of the pills seized before defendant Crews was taken to the police station and the pills seized pursuant to the search warrant obtained on the basis of the first seizure. We hold that the trial court's findings of fact on voir dire were based on competent evidence, the conclusions of law were supported by the findings and the admission of the evidence was proper.

On voir dire, the facts concerning the seizure of the brown bottle of pills were contested. The principal feature of the evidence relied upon by defendants is Crews' testimony that the officer opened the closet door and with the use of his flashlight

State v. Crews

saw a bottle on a shelf. The officer thereupon reached up to get the bottle from the shelf. The officers, on the other hand, testified that the closet door was open when they entered the room, and they followed Crews into the closet at which time he turned on the light. Officer Spillman testified that he was able to see the bottle on the shelf before he or defendant Crews entered the closet.

[1] It is completely obvious that the court's findings are supported by the testimony of both officers. Findings of fact made on voir dire are conclusive on appellate courts when supported by competent evidence. *State v. McVay* and *State v. Simmons*, 277 N.C. 410, 177 S.E. 2d 874 (1970). The officers were on the premises legally, the bottle was fully disclosed and open to eye and hand, and no search was required for its seizure. The warrantless seizure was, therefore, permissible under the "plain view" doctrine. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972) ; *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970).

[2] Inasmuch as the seizure of the brown bottle was valid, there can be no doubt that probable cause existed for the issuance of the search warrant under which the box of amphetamines was seized. The assignment of error to the admission of this evidence is overruled.

Defendants assign error to the trial court's instructions to the jury on the ground that it failed to define and apply the law to the evidence. We have carefully reviewed the charge, and we hold that, construed as a whole, it fairly and adequately explains the law. There is no merit to the assignment of error based on the court's failure to give equal stress to defendants' evidence. It is incumbent upon the court only to give a clear instruction applying the law to the evidence and the positions of the parties as to the essential features of the case.

Defendants have presented multiple assignments of error based on literally hundreds of exceptions. We have reviewed each of defendants' contentions, and we find that they present no significant or novel questions of law that merit our further discussion.

State v. Shumate

No error.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. RONNIE LEE SHUMATE

No. 7423SC207

(Filed 19 June 1974)

1. Assault and Battery § 14— firing into occupied dwelling — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for discharging a firearm into an occupied dwelling, although defendant presented evidence that he was firing at an owl and that no shots were fired in the direction of the house.

2. Criminal Law § 168— insufficiency of instructions — error cured by mandate

The jury could not have been misled by one portion of the charge which might have failed to make it perfectly clear that the jury must be satisfied beyond a reasonable doubt as to every element of the offense where the court in its final mandate stated the elements of the offense and the responsibility of the jury if they should have a reasonable doubt as to any one or more of the elements.

APPEAL from *Rousseau, Judge*, 6 August 1973 Session, WILKES County Superior Court. Argued in Court of Appeals 6 May 1974.

Defendant was charged with discharging a firearm into an occupied dwelling in contravention of G.S. 14-34.1. Defendant was convicted in the Superior Court and appeals, assigning as error the denial of his motion for nonsuit and portions of the court's instructions to the jury.

Attorney General Morgan, by Assistant Attorney General Costen, for the State.

Porter, Conner and Winslow, by Kurt B. Conner, for defendant appellant.

MORRIS, Judge.

[1] The evidence on the entire record, viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences, tends to establish the guilt of defendant, and is

State v. Shumate

therefore sufficient for submission to the jury. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971).

Roscoe Bobbitt testified that on 4 June 1973, he lived in a four-room "old boarded house" across the lane from Dennis Wyatt and down the road from defendant Ronnie Shumate. On that night, Bobbitt was in the house with his wife and three children. He testified that he saw Wyatt and Shumate standing in front of his house firing guns, and that several shots entered his house. He stated that he had known Wyatt and Shumate for about two and one half months prior to the incident and that he was able to see them clearly on the night in question. He testified that at least two shots made holes in the wall of the front room and lodged in a partition wall in the front room.

Mrs. Roscoe Bobbitt testified that on the night of the shooting she saw defendant Shumate fire shots, and she heard some shots hit the house although she did not know whether the shots entered the house.

Deputy Sheriff Roberts testified that he went to the Bobbitt house in response to a call for assistance from another officer. He was unable to find any holes in the house that evening, and when he returned the next morning he was likewise unable to find a hole that had been made by a bullet. They did not examine the interior of the house.

Defendant Shumate took the stand in his own behalf and testified that he and the Bobbitt family had had an argument on the date of the shooting. At 11:00 that evening, the time of the alleged offense, he and Wyatt were between the Wyatt house and the Bobbitt house. Both were armed, and they were looking for a screech owl that had been killing chickens. When they sighted the owl, they tried to shoot it while it was perched on top of a woodshed 75 feet from the Bobbitt house. The owl left the woodshed and flew to a light pole. They fired at the owl again. Defendant stated that the three shots fired at the owl were the only shots fired and that no shots were fired in the direction of the Bobbitt house.

Mrs. Dorothy Wyatt, mother of Dennis Wyatt and mother-in-law of defendant, stated that she saw her son and defendant shooting at a screech owl on the night in question and that only three shots were fired.

The evidence presented is clearly sufficient for submission to the jury. The testimony of the Bobbitts that defendant fired

Holloman v. Holloman

shots into their house, if believed, is sufficient to convict defendant. Defendant's evidence that he was firing at a screech owl serves only to contradict State's evidence, and to put its credibility in issue. The motion for nonsuit was properly denied.

[2] Defendant assigns error to the portion of the court's instruction to the jury with respect to the elements of the offense. While this instruction, standing alone, may not make it perfectly clear that the jury must be satisfied beyond a reasonable doubt as to every element of the offense, the court in its final mandate to the jury, so clearly stated the elements of the offense and the responsibility of the jurors if they should have a reasonable doubt as to any one or more of the elements that we cannot perceive that the jury could have been misled.

If the charge of the court, considered as a whole, presents the law fairly and clearly, there is no ground for reversal even though some of the expressions standing alone may be erroneous. *State v. Vample*, 20 N.C. App. 518, 201 S.E. 2d 694 (1974). This assignment of error is overruled.

No error.

Judges CAMPBELL and VAUGHN concur.

ARTHUR M. HOLLOMAN v. LLOYD E. HOLLOMAN

No. 7411DC255

(Filed 19 June 1974)

Automobiles § 68— defective door — failure to warn passenger

Plaintiff passenger's evidence was sufficient to be submitted to the jury on the issue of defendant driver's negligence in failing to warn him of the defective condition of a door on the vehicle where it tended to show that the door came open when plaintiff was thrown against it upon defendant's sudden application of the brakes, that plaintiff fell out the door and was injured, that defendant told him after the accident that the door had come open without warning prior to this occasion, that plaintiff did not know of this until defendant told him about it and that defendant did not warn him the door was defective prior to the accident.

APPEAL by defendant from *Lyon, Judge*, 12 November 1973
Session of District Court held in JOHNSTON County.

Holloman v. Holloman

This is an action to recover damages for personal injuries. On 3 May 1971 plaintiff and defendant were returning to work after the noonday meal. Defendant was driving his 1964 Dodge panel truck, and plaintiff was riding in the right front seat. As defendant was backing out of a parking space, the right door of the truck came open. Plaintiff fell out the door and was injured.

Plaintiff brought this action in the District Court of Johnston County, alleging that defendant had been negligent in that he "failed to warn plaintiff of the condition of the door latch on the right hand door, next to which the plaintiff was sitting, prior to the accident. The defendant, knowing that the right door had a propensity to swing open, without warning, as it had done so at various times in the past."

Plaintiff testified at the trial that he had closed the door tightly when he got into the truck. He stated:

"Since the accident I have talked to my brother. He told me since the accident that door had come open before then. I didn't know that at the time. As to whether my brother told me that the door would come open, no, it had never come up before then. After the accident, he did tell me that the door had come open."

Defendant moved for a directed verdict at the close of plaintiff's evidence and again at the close of all the evidence. His motions were denied. The jury returned a verdict for plaintiff in the amount of \$1500.00. Judgment was entered in accordance with the verdict, and defendant appealed.

Barnes & Braswell, P.A., by W. Timothy Haithcock, for plaintiff appellee.

Teague, Johnson, Patterson, Dilthey & Clay, by Ronald C. Dilthey, for defendant appellant.

BALEY, Judge.

The sole issue presented by this appeal is whether the trial court erred in denying defendant's motions for a directed verdict.

When defendant moves for a directed verdict, the evidence must be viewed in the light most favorable to plaintiff. *Winters v. Burch*, 284 N.C. 205, 200 S.E. 2d 55; *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549; *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47. Plaintiff testified that he closed the door and

State v. Thompson

that it came open when he was thrown against it upon defendant's sudden application of the brakes. According to plaintiff's testimony, defendant told him after the accident that the right door of the truck had come open without warning prior to this occasion. Plaintiff had not known of this until defendant told him about it. When plaintiff got into the truck on 3 May 1971, defendant did not warn him that the door was defective or had come open unexpectedly prior to this accident.

In *McGee v. Cox*, 267 N.C. 314, 315, 148 S.E. 2d 132, 133, the Supreme Court of North Carolina stated:

“Where the owner or operator of a motor vehicle has knowledge of the defective condition of the vehicle which would make riding in it hazardous or unsafe for a guest, and believes or has reason to believe that the guest would not discover the danger, he has an obligation to warn the guest of such danger and risk and to exercise reasonable care in the operation and control of the vehicle in view of its known defective condition. For instance, where he knew, or in the exercise of reasonable care should have known, that such equipment was in a defective condition, and the guest had no knowledge, actual or constructive thereof, the owner or operator of a motor vehicle is liable for injuries sustained by a guest by reason of . . . a defect in . . . a door.’”

The evidence presented by plaintiff was sufficient to go to the jury. The court properly denied defendant's motions for directed verdict.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. MICHAEL THOMPSON

No. 7415SC400

(Filed 19 June 1974)

1. Criminal Law § 87— leading questions — allowance proper

The trial court did not abuse its discretion in allowing the prosecuting attorney to ask a State's witness leading questions which did

State v. Thompson

not relate directly to the events which occurred at the time of the offense charged.

2. Criminal Law § 87— redirect examination — limitation proper

The trial court in this assault case did not err in excluding testimony on redirect examination of defendant, since that testimony did not clarify, but directly contradicted his testimony given on his examination in chief, and did not relate to any matter brought out on cross-examination.

ON *Certiorari* to review defendant's trial and conviction before *Bailey, Judge*, 4 June 1973 Session of Superior Court held in ALAMANCE County.

Defendant pled not guilty to an indictment proper in form, charging him with an assault with a deadly weapon with intent to kill inflicting serious injuries. The State presented the testimony of Keith Phillips, the victim of the assault, who testified: He talked with defendant at Cummings High School about whether defendant had been dating Phillips's girlfriend. At that time Phillips saw a pistol inside defendant's jacket. When defendant made a movement "like he was going to get the pistol," Phillips hit defendant with his fist and then turned and ran out of the school. Defendant followed and shot Phillips in the back with a pistol, inflicting injuries for which Phillips was hospitalized for four weeks.

Defendant testified that after he followed Phillips out of the school building, Phillips stopped and turned, stating "I've got you where I want you"; that Phillips then put his hand in the pocket of his coat; that defendant saw the handle of a gun, which Phillips appeared ready to withdraw, when defendant fired his own pistol.

Defendant was found guilty of assault with a deadly weapon inflicting serious injury, and judgment was imposed sentencing defendant to prison for the term of not to exceed five years in the custody of the Commissioner of Correction as a "committed youthful offender" for treatment and supervision pursuant to G.S. Chap. 148, Art. 3A. To this judgment, defendant in apt time gave notice of appeal. To permit perfection of the appeal, this Court subsequently granted his petition for writ of certiorari.

Attorney General Robert Morgan by Associate Attorney General Charles J. Murray for the State.

Frederick J. Sternberg for defendant appellant.

State v. Thompson

PARKER, Judge.

[1] Defendant first assigns error to the trial court's action in permitting the prosecuting attorney to ask certain leading questions at the commencement of the direct examination of the State's witness, Phillips. These questions related to the date Phillips came to or had been in Alamance County, and did not relate directly to the events which occurred at the time of the assault. The allowance of leading questions is a matter within the discretion of the trial judge, and his rulings in this regard will not be reviewed on appeal in the absence of a showing of an abuse of discretion. *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384; 1 Stansbury's N. C. Evidence, Brandis Revision, § 31. No abuse of discretion is here shown.

[2] On direct examination, defendant testified that he had known the prosecuting witness, Phillips, almost all of his life and that as far as he knew they had had no disagreement prior to the occasion giving rise to the present trial. On redirect examination, defendant's counsel asked him if he had been threatened by the prosecuting witness and whether defendant's brother had worked as a police informant, resulting in the arrest of the prosecuting witness's brother, to both of which questions defendant answered "Yes." The court sustained the solicitor's objections to both questions and allowed his motions to strike the answers. In this, defendant suffered no prejudicial error. As a general rule, the object of redirect examination "is to clarify the subject matter of the direct examination and new matter elicited on cross-examination, and not to produce new evidence, for if new evidence were produced, the adversary would be entitled to cross-examine as to this, and so the examination of witnesses might become interminable." 1 Stansbury's N. C. Evidence, Brandis Revision, § 36. Here, the testimony which was excluded from defendant's redirect examination did not clarify, but directly contradicted his testimony given on his examination in chief, and it did not relate to any matter brought out on cross-examination. Although it was in the discretion of the trial court to permit the scope of redirect examination to be expanded, we can perceive no prejudice to defendant in the court's refusal to do so in this case. Whether the bad feeling between defendant and the prosecuting witness arose from girl trouble or from other causes had no material bearing on defendant's guilt or innocence in this case.

State v. Averette

The only remaining assignment of error brought forward and argued in defendant appellant's brief is not sufficiently meritorious to warrant discussion and is also overruled.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROBERT LEON AVERETTE

No. 7410SC376

(Filed 19 June 1974)

**Burglary and Unlawful Breakings § 4; Larceny § 6— break-in of drugstore
— admissibility of items connected with crime**

A cash box, bottles of narcotics, prescription scales, pry bars, a chisel, and a paper listing the drugs found in the basement of defendant's residence tended to show the break-in and larceny of a drugstore with which defendant was charged and were sufficiently tied to the defendant by the testimony of other witnesses so as to be circumstantial evidence of his guilt.

APPEAL by defendant from *McKinnon, Judge*, 17 December 1973 Session of Superior Court held in WAKE County. Heard in the Court of Appeals on 23 April 1974.

This is a criminal action wherein the defendant, Robert Leon Averette, was charged in a bill of indictment, proper in form, with felonious breaking or entering and felonious larceny and receiving. Upon arraignment, the defendant entered a plea of not guilty and the State offered evidence tending to establish the following:

Carol Ruth Dane, the principal witness for the State, testified that she had moved from South Carolina to Raleigh in May 1973 and that a short time thereafter she moved into a house on Cabarrus Street, where defendant and several other people also resided. On 22 May 1973, defendant informed Dane and several others that he had developed plans to break into a local drug store but that he had not pursued these plans because he had been unable to find anyone to help him. Several people, including the State's witness, volunteered their services and later on the same evening, three men (including defendant) entered the Arnold Rexall Drug Store on Hillsborough Street,

State v. Averette

while Dane and another female companion served as lookouts. Approximately thirty minutes after entering the drug store, the defendant and the other accomplices picked up Dane at her lookout position; and at this time, she observed a safe in the trunk of the automobile.

Upon returning to the house, the defendant and his companions were unable to open the safe. The next day, according to the testimony of witness Dane, she heard a pounding noise from the basement and that a short time after the noise ceased, the defendant came upstairs with a small metal box containing money and some drugs. Thereafter the defendant and the other members involved in the break in divided the money and drugs.

The State also offered as a witness Mr. B. D. Arnold, owner of the drug store; and he identified the money box and some of the drugs offered into evidence as items which were in the safe on the night of the robbery. Further evidence tended to show that the drug store was entered by means of prying out a fan and opening a window, and that the doors of the drug store which had previously been locked were broken open.

The defendant offered evidence tending to show that on the date of the break in he was in Black Mountain visiting a girl friend. Also, he testified that he did not meet Carol Dane until 24 May 1973, two days after the alleged crime had been committed. Finally, his evidence tended to show that he saw Dane and others in the possession of a considerable amount of drugs and a metal box at a date subsequent to 22 May 1973.

The jury, after deliberation, returned verdicts of guilty of felonious breaking or entering and felonious larceny as charged. The judgment imposed thereon called for the defendant to be imprisoned for the term of ten (10) years on the charge of breaking or entering and for defendant to be imprisoned for the term of ten (10) years on the charge of felonious larceny, this latter sentence to run concurrently with the sentence above imposed on the count of breaking or entering.

The defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General William F. Briley for the State.

T. Dewey Mooring, Jr., for defendant appellant.

State v. Johnson

HEDRICK, Judge.

Defendant contends that the trial court committed error in permitting the introduction of certain of the State's exhibits. The exhibits which are the subject of this assignment of error are as follows: a cash box, bottles which contained narcotics, prescription scales, two pry bars, a chisel, and a paper listing the drugs found in the basement of the house in question. The defendant argues that the introduction of the exhibits served only the purpose of corroborating the State's witness Carol Dane's testimony, and that the exhibits were inadmissible for this purpose, as the witness' credibility had not been attacked. This argument is without merit. All of the items introduced into evidence by the State tended to show the break in and larceny with which the defendant was charged and were sufficiently tied to the defendant by the testimony of other witnesses so as to be circumstantial evidence of his guilt. *State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971), cert. denied 406 U.S. 974 (1972); *State v. Stroud*, 254 N.C. 765, 119 S.E. 2d 907 (1961).

We have carefully reviewed defendant's two other assignments of error and find them also to be without merit. The defendant was afforded a fair trial free from prejudicial error.

No error.

Judges BRITT and CARSON concur.

STATE OF NORTH CAROLINA v. ROBERT LEE JOHNSON

No. 7421SC434

(Filed 19 June 1974)

1. Criminal Law § 66— identification in hospital emergency room — in-court identification — independent origin

The evidence supported the trial court's determination that a robbery victim's in-court identification of defendant was of independent origin and was not tainted by the victim's identification of defendant in a hospital emergency room where it tended to show that the victim got a good look at defendant at the time of the robbery, that the robbery occurred in broad daylight, and that the victim had seen defendant on several occasions prior to the robbery.

State v. Johnson

2. Criminal Law § 34— common law robbery — evidence defendant was arrested for carrying concealed weapon — harmless error

In this prosecution for common law robbery, admission of an officer's testimony that he approached defendant because he fit the description given by the victim, searched him, discovered a hawkbill knife and arrested him for carrying a concealed weapon constituted harmless error in light of the State's evidence of defendant's guilt of the crime charged.

3. Robbery § 5— common law robbery — instructions mentioning armed robbery and carrying concealed weapon

In a common law robbery prosecution wherein an officer testified he found a hawkbill knife during a search of defendant and arrested him for carrying a concealed weapon, the trial court did not err in instructing the jury that defendant was not being tried for armed robbery and carrying a concealed weapon.

APPEAL by defendant from *McConnell, Judge*, 28 January 1974 Session of Superior Court held in FORSYTH County.

This is a criminal action wherein the defendant, Robert Lee Johnson, was charged in a bill of indictment, proper in form, with common law robbery. Upon arraignment the defendant entered a plea of not guilty. The State offered evidence which tended to establish the following:

On the afternoon of 4 November 1973, the prosecuting witness, Edward Smith, was walking across a school lot when two men came up from behind him and threw him to the ground. After knocking him down and kicking him in the head, they took his wallet which contained two hundred dollars. The victim further testified that he recognized the defendant as being one of the two men who robbed him.

From a verdict of guilty as charged and judgment thereon imposing a sentence of not less than three (3) nor more than five (5) years, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Kenneth B. Oettinger for the State.

D. Blake Yokley for defendant appellant.

HEDRICK, Judge.

[1] Defendant, by his first assignment of error, asserts that the trial court committed error by allowing the in-court identification of defendant by the prosecuting witness. The trial court, following the established procedure, conducted a *voir dire* to

State v. Johnson

ascertain if the witness' in-court identification was of independent origin and not tainted by impermissibly suggestive out of court procedures.

Evidence elicited at this *voir dire* disclosed that the victim "got a good look" at defendant at the time of the alleged robbery; that the robbery occurred in broad daylight; and that the victim had seen defendant on several occasions prior to the alleged robbery. Further evidence tended to show that after the defendant was apprehended, he was taken to the emergency room of a local hospital and was identified there by the victim as the perpetrator of the crime.

At the completion of the *voir dire*, the trial court made findings of fact and concluded that the prosecuting witness' in-court identification was based upon his observation of the defendant at the time of the alleged robbery. The findings of the trial court are supported by competent evidence and thus are binding upon this court. *State v. Morris*, 279 N.C. 477, 481, 183 S.E. 2d 634, 637 (1971). Moreover, these findings support the conclusion that the in-court identification was of independent origin. Therefore, this assignment is without merit.

[2] By his next assignment of error the defendant maintains that the trial court erred in admitting into evidence certain testimony of a State's witness, Officer G. A. Floyd. The officer testified that he observed a subject matching the description given to him by the prosecuting witness and that he approached this man. Officer Floyd then testified that upon searching the subject, he discovered a hawkbill knife and arrested defendant for carrying a concealed weapon. Defendant contends that the admission of such testimony over his objection was prejudicial error.

Even conceding, *arguendo*, that the admission of this evidence was error and that it would have been technically correct to strike this particular portion of the officer's testimony, we are of the persuasion that admission of this evidence was mere technical error, not prejudicial error. "Where there is abundant evidence to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." 3 Strong, North Carolina Index 2d, Criminal Law, § 196, p. 135.

State v. Kassouf

[3] Finally, defendant contends that the trial court committed error in its charge to the jury. The specific portions of the charge which are attacked as erroneous deal with the judge's instructions that the defendant was not being tried for armed robbery and carrying a concealed weapon. Although it would probably have been preferable that the able trial judge not mention these other offenses, we believe his only purpose in mentioning them was to clarify the issues for the jury and to make sure that the jury understood that those offenses were not involved in this case. Therefore, this assignment of error is without merit.

In the trial of defendant, we find no prejudicial error.

No error.

Judges BRITT and CARSON concur.

STATE OF NORTH CAROLINA v. JOHN M. KASSOUF

No. 748SC297

(Filed 19 June 1974)

1. Indictment and Warrant § 12— amendment of gambling warrant proper

The trial court did not err in allowing amendments to the warrant charging defendant with a violation of G.S. 14-292 (gambling).

2. Constitutional Law § 30— speedy trial — no showing of prejudice

The trial court properly denied defendant's motion to dismiss for failure to afford him a speedy trial where any delay in defendant's trial was precipitated by his own acts, defendant at no time demanded a trial, and defendant showed no prejudice resulting from delay.

3. Gambling § 4— quantum of proof for conviction — confusing instruction prejudicial

The trial judge in a gambling case erred in instructing the jury on the quantum of proof necessary to convict defendant when he charged that "the State does not have to satisfy you beyond a reasonable doubt if they saw the defendant engaged in a game of chance and money was being bet on it. That would be enough for you to find the defendant guilty if you are satisfied of that beyond a reasonable doubt."

APPEAL by defendant from *Webb, Judge*, 12 November 1973 Session of Superior Court held in LENOIR County. Heard in the Court of Appeals on 17 April 1974.

State v. Kassouf

This is a criminal action wherein the defendant, John M. Kassouf, was charged in a warrant with a violation of G.S. 14-292 (gambling). Defendant was tried in the District Court, found guilty, given a suspended sentence, and fined \$25.00. Defendant appealed from this conviction and was afforded a trial *de novo* in the Superior Court. In the Superior Court, the defendant was found guilty; and from a judgment imposing an active sentence of six months, the defendant appealed.

Attorney General Robert Morgan and Deputy Attorney General R. Bruce White, Jr., by Guy A. Hamlin for the State.

Turner and Harrison by Fred W. Harrison for defendant appellant.

HEDRICK, Judge.

[1] Defendant, by his first assignment of error, contends that the trial court erred in failing to allow his motion to quash the warrant and in allowing the State's motion to amend the warrant over defendant's objection. "Under our practice, our courts have the authority to amend warrants defective in form and even in substance; provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant." *Carson v. Doggett* and *Ward v. Doggett*, 231 N.C. 629, 58 S.E. 2d 609 (1950). See also, *State v. Young*, 13 N.C. App. 237, 185 S.E. 2d 4 (1971). We hold that the court did not err in allowing the amendments to the warrant. Furthermore, *State v. Tarlton*, 208 N.C. 734, 182 S.E. 481 (1935), which defendant cites in his brief in support of this assignment of error is readily distinguishable from the instant case in that in *Tarlton* the State did not move to amend the warrant until after the verdict had been returned in the Superior Court.

[2] Next, defendant asserts that the trial court erred in denying his motion to dismiss for failure to afford the defendant a speedy trial. In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court listed the factors to be considered in determining whether a defendant has been denied the right to a speedy trial. These factors include: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of his right to a speedy trial; and (4) how such delay has prejudiced the defendant. The record reflects that any delay in the trial was precipitated by defendant's own acts; that defendant at no time demanded a trial; and, that defendant has not shown any

State v. Kassouf

prejudice resulting from such delay. Considering these factors we conclude that the trial court properly denied defendant's motion.

[3] Next, defendant assigns as error that portion of the judge's charge to the jury which is set forth below:

"(I charge for you to find the defendant guilty of gambling, the State must prove two things: the State must prove one of two things beyond a reasonable doubt. First, that the defendant bet money on a game of chance. A game of chance is a game of chance if the element of chance predominates over the element of skill. I instruct you card games on which money is bet are considered games of chance under our laws.)

To the above paragraph in parentheses, defendant objects and excepts. EXCEPTION #10.

(Second, the State does not have to satisfy you beyond a reasonable doubt if they saw that the defendant engaged in a game of chance and money was being bet on it. That would be enough for you to find the defendant guilty if you are satisfied of that beyond a reasonable doubt.)

To the above portion of charge in parentheses, defendant objects and excepts. EXCEPTION #11."

We agree with defendant's contention that this part of the charge is in error.

The primary purpose of a charge is to give a clear instruction which applies the law to the evidence in such a fashion as to assist the jury in comprehending the case and in reaching a proper verdict. *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971); *State v. Biggs*, 224 N.C. 722, 32 S.E. 2d 352 (1944). In the case at bar, that portion of the charge which is quoted above is confusing and very easily could have misled the jury with regard to the quantum of proof which was necessary to convict the defendant. For this reason the defendant must be afforded a

New trial.

Judges BRITT and CARSON concur.

Hill v. Jones

OBIE G. HILL v. DAVID RAY JONES AND H. R. JONES TOOL
& SUPPLY COMPANY

No. 7418DC182

(Filed 19 June 1974)

Automobiles §§ 50, 73— changing lanes — sufficiency of evidence of negligence and contributory negligence

The trial court in an automobile collision case erred in granting defendant's motion for a directed verdict where plaintiff's evidence gave rise to at least an inference that defendant did not exercise due care in changing lanes and in observing adequately the motorists in both lanes in front of him and where the evidence did not disclose contributory negligence on plaintiff's part so clearly that no other conclusion could be drawn therefrom.

APPEAL from *Haworth, Judge*, 17 September 1973 Civil Session of GUILFORD County District Court. Argued in the Court of Appeals 6 May 1974.

Plaintiff appeals from the granting of a directed verdict for defendant in an automobile negligence action. Plaintiff alleged that he was travelling in the left lane of two westbound lanes and that defendant was following him in the right lane. An unknown motorist pulled from the right hand curb and crossed both lanes and turned left in front of plaintiff, causing plaintiff to apply his brakes. Plaintiff further alleged that he was struck from the rear by defendant, who had just moved from the right lane to the left lane.

In his answer, defendant admitted that an unknown vehicle pulled from the curb in front of plaintiff. However, he averred that plaintiff was travelling in the right lane and changed to the left lane in order to avoid the unknown motorist. Defendant further averred that he was travelling in the left lane, and that when plaintiff moved to the left lane, defendant attempted to cross to the right lane. Seeing the right lane blocked by the unknown motorist, defendant was forced back into the left lane when he struck plaintiff's car. He further averred that plaintiff changed lanes without signalling or determining that the movement could be made safely.

At trial plaintiff testified that he was travelling in the left lane in heavy traffic when the unknown motorist pulled out in front of him. When he applied his brakes, he was struck from the rear by defendant. He further testified that after the

Hill v. Jones

accident, he observed no skid marks from his car, but there were skid marks made by the truck which "started in the right side and skidded going over the center lane and hit my car clockwise."

At the close of plaintiff's evidence defendant moved for a directed verdict on the grounds that (1) plaintiff failed to offer any evidence of negligence which was a proximate cause of the accident, and (2) even if plaintiff's evidence established negligence, it also established plaintiff's contributory negligence as a matter of law. The motion was granted, and plaintiff appealed.

Hubert E. Seymour, Jr., for plaintiff appellant.

Henson, Donahue and Elrod, by Joseph E. Elrod III, for defendant appellees.

MORRIS, Judge.

Plaintiff brings forward only one exception, and we feel that it is well taken. The motion for directed verdict should have been denied inasmuch as plaintiff's evidence, viewed in the light most favorable to him, was sufficient to create an inference of negligence on the part of the defendant.

In the case before us, the evidence of plaintiff gives rise to at least an inference that defendant did not exercise due care in changing lanes and failing to observe adequately the motorists in both lanes in front of him, and that the lack of due care was a proximate cause of the accident.

Nor do we think that the evidence discloses contributory negligence on plaintiff's part so clearly that no other conclusion can be drawn therefrom, as must be the case for defendant to prevail on a motion for a directed verdict based on plaintiff's contributory negligence as a matter of law. *Smith v. Coach Lines*, 12 N.C. App. 25, 182 S.E. 2d 4 (1971), cert. denied 279 N.C. 395 (1971). Where, as here, more than one conclusion can reasonably be drawn from the evidence, the issue should be submitted to the jury. *Maness v. Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816 (1971), cert. denied 278 N.C. 522 (1971).

For the reasons stated, plaintiff is entitled to a

New trial.

Judges CAMPBELL and VAUGHN concur.

Long v. Board of Adjustment

THOMAS E. LONG AND WIFE, SANDRA M. LONG, AND GRADY L. MORRIS AND WIFE, JOANNA C. MORRIS, PETITIONERS v. THE WINSTON-SALEM BOARD OF ADJUSTMENT, FRED D. HAUSER, PETER T. MELETIS, NORMAN SWAIM, JOHN G. PALMER, GEORGE W. CRONE AND GEORGE F. NEWELL, RESPONDENTS

No. 7421SC299

(Filed 19 June 1974)

Municipal Corporations § 30— application for special use permit — absence of findings — remand for de novo hearing

Application for a special use permit to construct multi-family dwellings is remanded to the board of adjustment for a hearing *de novo* where the board's denial of the permit was not supported by findings of fact and the record does not contain substantial competent evidence supporting the superior court's order that the permit must be issued and directing the imposition of special conditions to be attached to the issuance of the permit.

APPEAL by respondents from *Wood, Judge*, 10 December 1973 Session of Superior Court held in FORSYTH County.

Plaintiffs' application for a special use permit was denied by defendant, Board of Adjustment. Plaintiffs' petition for certiorari to the Superior Court was granted.

Plaintiffs seek a special use permit for the construction of multi-family dwellings on their property. The property is zoned R-4, and local zoning ordinances authorize multi-family dwellings in an R-4 zone if a special use permit is obtained.

The Superior Court reversed and ordered the Board of Adjustment to issue a special use permit subject to:

“those reasonable conditions recommended by the Winston-Salem/Forsyth County Planning Board; that is, that petitioners begin no construction on the property in question until Sandersted Road is dedicated and until said road is paved up to petitioners' property line, and any other reasonable conditions that said Board feels should attach.”

Defendants appealed.

White and Crumpler by Melvin F. Wright, Jr., for petitioner appellees.

Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr., for respondent appellants.

Long v. Board of Adjustment

VAUGHN, Judge.

A board of adjustment's denial of a special use permit should be based on findings of fact supported by competent, material and substantial evidence. *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129, and cases cited therein. The Board made no findings of fact. After two hearings, where apparently none of the evidence was given under oath, the Board's findings in their entirety were as follows:

" . . . Mr. Palmer stated that in his opinion the Planning Board and others who had reviewed the site plan had erred in judgment by not determining that the proposed development would create a traffic hazard. He read from the ordinance the following site requirement relating to planned residential developments:

'Streets or highways, both within and in the vicinity of the planned residential development, shall be of such design and traffic-carrying capacity that the construction of a planned residential development would not create a traffic hazard.'

Based on the above, Mr. Palmer made a motion to deny the application. Mr. Meletis seconded the motion, and the vote was unanimous in favor of denial."

Assuming that the foregoing could be treated as a finding of fact, it is not supported by substantial competent evidence in the record before us. Neither does the record contain such substantial competent evidence as to allow the court to hold, as a matter of law, that the permit must be issued and specifically direct the imposition of special conditions to be attached to the issuance of the permit.

The judgment of the Superior Court is vacated. The cause is remanded to the Superior Court of Forsyth County for entry of a judgment (1) vacating the purported findings of fact and order of the Board of Adjustment, and (2) directing the Board to consider the application *de novo* and to make findings of fact based on competent evidence.

Vacated and remanded.

Judges CAMPBELL and MORRIS concur.

Board of Transportation v. Harrison

BOARD OF TRANSPORTATION (FORMERLY STATE HIGHWAY COMMISSION) v. ARTHUR HARRISON

No. 741SC323

(Filed 19 June 1974)

Appeal and Error § 63— certiorari improvidently issued — cause remanded

Cause is remanded to Superior Court for further proceedings where writ of certiorari was improvidently entered upon denial of plaintiff's motions for dismissal and summary judgment.

ON writ of certiorari to review an Order entered by *Martin (Perry)*, Judge, 26 November 1973 Session of Superior Court held in CURRITUCK County.

Plaintiff instituted this action seeking to enjoin defendant from barricading a roadway across defendant's property. Plaintiff alleges the roadway has been dedicated to public use and maintained as a secondary public road by plaintiff. Defendant denied all material allegations of the complaint.

Plaintiff obtained a preliminary injunction preventing defendant from interfering with the use of the said roadway by plaintiff and the general public.

Plaintiff then filed a motion to dismiss the action under Rule 12(b) (6) (failure to state a claim upon which relief can be granted), and further moved under Rule 56 for summary judgment for plaintiff.

Judge Martin denied both motions and upon plaintiff's petition, this Court issued a writ of certiorari.

Attorney General Morgan, by Assistant Attorney General Magner, for the State.

Twiford, Abbott & Seawell, by John G. Trimpi, for the defendant.

BROCK, Chief Judge.

It seems significantly strange that plaintiff would seek to dismiss its own lawsuit. Such a Rule 12(b) (6) motion becomes even more of an oddity when joined with the plaintiff's motion for summary judgment in its favor.

In any event, after reviewing the record before us, we conclude that our writ of certiorari was improvidently issued. This

State v. Henderson

cause is remanded to the Superior Court in Currituck County for such further proceedings as may be deemed appropriate.

Remanded.

Judges PARKER and BAILEY concur.

STATE OF NORTH CAROLINA v. RACHEL BURINE HENDERSON

No. 7419SC382

(Filed 19 June 1974)

APPEAL by defendant from *Seay, Judge*, 29 October 1973 Session of Superior Court held in RANDOLPH County.

Rachel Burine Henderson, the defendant, was convicted of driving under the influence on 10 November 1972, and received a sentence of six months. This sentence was suspended and the defendant was placed on probation for a period of three years. On 16 July 1973 a bill of particulars alleging violations of the terms and conditions of the probation judgment was duly served on the defendant. At the subsequent hearing on this matter, the State offered the testimony of Mrs. Sandra Strader Pugh (probation officer), who testified that the defendant had violated the terms and conditions of her probation in the following manner: (1) by being convicted of public drunkenness; (2) by changing her place of residence without the written consent of her probation officer.

From the order of the trial court revoking probation and ordering the sentence into effect, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Keith L. Jarvis for the State.

Miller, Beck, O'Briant and Glass by F. Stephen Glass for defendant appellant.

HEDRICK, Judge.

Counsel for defendant candidly admits that he is unable to discern any errors of law in the disposition of this case and requests that we review the record. Accordingly, we have carefully reviewed the record and find that the court revoking de-

State v. Daye

fendant's probation was duly organized; that the defendant was afforded proper notice and hearing and the defendant was represented by counsel at this hearing; that the facts found support the court's conclusion that the defendant had violated the terms and conditions of her probation; that the order entered revoking her probation and activating the sentence imposed in this judgment is in proper form; and the sentence imposed in the judgment is within the limits prescribed in the statute for the offense charged. The order appealed from is

Affirmed.

Judges BRITT and CARSON concur.

STATE OF NORTH CAROLINA v. RICKY ALLEN DAYE

No. 7415SC457

(Filed 19 June 1974)

APPEAL from *Exum, Judge*, 19 November 1973 Session of ALAMANCE County Superior Court. Argued in the Court of Appeals 28 May 1974.

Defendant was charged in a valid bill of indictment with armed robbery. The State's evidence tended to show that defendant Daye entered McCauley's Art Shop with Vic Miles. When Mrs. Alene McCauley asked the two if she could help them, the two boys looked around the store for a few minutes and left. The two returned to the store with Miles holding a nickel-plated gun. Miles told Mrs. McCauley to give him her money. Miles took money from the cash register, the billfold from Mrs. McCauley's pocketbook, and rummaged through the drawers in the shop's office. During the robbery, Daye stood in front of the counter unarmed, and said nothing to the victims. However, he told Miles not to take the change from the cash register. Mrs. McCauley, her husband and their daughter all made positive identifications of defendant Daye, and all stated that they had not seen him between the time of the robbery and the time of the trial. Mrs. McCauley also testified that Daye and Miles came into the store "side by side" and left "side by side."

Vic Miles testified that defendant Daye showed him a pistol and told him he wanted him to go with him to rob Swan's

State v. Alexander

Grocery, which was next door to the Art Shop. After the two had left the Art Shop after looking around, Daye told Miles "Since I was going to get Swan's, why don't you get the Art Shop?" Daye handed the pistol to Miles and told him "All you have to do is say 'give me your money.'" The remainder of Miles' testimony was substantially the same as that of Mrs. McCauley concerning the robbery.

Dana Tingen of the Burlington Police Department, Youth Division, corroborated the testimony of Miles. He testified that Miles gave him a statement similar to his testimony 21 days after the robbery.

Defendant's motion for nonsuit was denied at the close of State's evidence. Defendant presented no evidence. The jury returned a verdict of guilty of common law robbery, and upon being polled, each juror stated his acquiescence in the verdict. From signing and entry of judgment, defendant appealed.

Attorney General Morgan, by Assistant Attorney General Cole, for the State.

David I. Smith for defendant appellant.

MORRIS, Judge.

Defendant presents the record for review by this Court. We have carefully reviewed the record, and we find that defendant was represented by competent counsel, and he received a fair and impartial trial free from prejudicial error.

No error.

Judges HEDRICK and BAILEY concur.

STATE OF NORTH CAROLINA v. JOSEPH FRANCIS ALEXANDER
AND FLOYD STRICKLAND, JR.

No. 7413SC242

(Filed 19 June 1974)

APPEAL by defendants from *Clark, Judge*, 22 June 1973
Session of Superior Court held in COLUMBUS County.

State v. Massingale

Defendants were each charged in separate bills of indictment, in proper form, with the breaking and entering of a hardware store of Ellis Meares & Son, Inc., in Fair Bluff, N. C., and two counts of safecracking. Defendants pleaded not guilty and the jury returned verdicts of guilty as charged.

For purpose of judgment, the court consolidated the safecracking charges against each defendant and entered judgments imposing the following prison sentences: As to defendant Alexander, not less than 20 nor more than 30 years; as to defendant Strickland, not less than 22 nor more than 30 years. Each defendant was given credit for 101 days confinement awaiting trial. With respect to the breaking and entering charges, judgments were continued for a period of 5 years.

Attorney General Robert Morgan, by Assistant Attorney General Sidney S. Eagles, Jr., for the State.

James E. Hill, Jr., for defendant appellants.

BRITT, Judge.

In separate briefs, defendants have brought forward and argued numerous assignments of error. After careful consideration of each assignment, we conclude that neither defendant has assigned error sufficient to warrant a new trial or to disturb the verdicts and judgments.

No error.

Chief Judge BROCK and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. STEVE MASSINGALE
AND DANNY MASSINGALE

No. 7427SC425

(Filed 19 June 1974)

APPEAL by defendants from *Friday, Judge*, at the 22 October 1973 Session of GASTON Superior Court.

Heard in the Court of Appeals 12 June 1974.

State v. Massingale

Defendants were charged and convicted of the felonious larceny of a riding lawn mower from the Bessemer City Machine Shop.

Attorney General Robert Morgan by Assistant Attorney General Myron C. Banks.

Robert D. Forbes and Nicholas Street for defendant appellants.

CAMPBELL, Judge.

This appeal presents only the face of the record for our review. We have carefully reviewed the record and find no prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

Lewis v. Fowler

ELLIOT LEWIS v. HENRY ROY FOWLER, ELISE CARMICHLE FOWLER, EVELYN PACE CRANFORD, AND BOBBY BUTTS BUICK, INC.

No. 7420SC271

(Filed 3 July 1974)

1. Automobiles §§ 56, 60—skidding on ice—striking stopped vehicle—sufficiency of evidence of negligence

In an action to recover for property damages sustained in an automobile collision the trial court properly granted defendant Fowlers' motion for directed verdict where the evidence tended to show that defendant crossed an icy bridge, observed plaintiff's vehicle partly blocking one lane of the highway ahead of him and another car partly blocking the other lane several feet beyond plaintiff's car, defendant skidded to a stop some twenty feet in front of plaintiff's car and remained there just a few seconds, as defendant attempted to move his vehicle from its stopped position he was hit by a third vehicle, and the blow spun defendants' vehicle around and knocked it twenty feet into the front of plaintiff's car, resulting in plaintiff's damages.

2. Automobiles §§ 56, 60—skidding on ice—striking stopped vehicle—sufficiency of evidence of negligence

The trial court erred in directing verdicts in favor of defendants Cranford and Bobby Butts Buick, Inc., where the evidence would support but not compel findings that (1) defendant Cranford failed to keep a proper lookout, since she did not see two cars some distance ahead of her, though the lights of the cars were on and defendant's view was unobstructed, and (2) defendant Cranford was driving at a speed greater than was reasonable and prudent under the circumstances, since defendant applied her brakes but ceased when she realized she was on ice, and, despite efforts to slow her car, struck a pickup truck with such force that it was knocked twenty feet into plaintiff's vehicle.

3. Automobiles § 70—stopping on highway—sufficiency of evidence of negligence

The trial court in an automobile collision case erred in directing verdicts in favor of plaintiff and against the counterclaims filed against him by all defendants for personal injury and property damages where the evidence tended to show that plaintiff stopped his car opposite a car which had skidded on ice and come to rest partly on the highway and that plaintiff's vehicle substantially blocked the lane in which he was stopped, and where it was reasonably foreseeable that a substantial blockage of both traffic lanes immediately to the west and downgrade from the icy bridge could cause a pile up of vehicles which were crossing the bridge from the east.

APPEAL by all parties from directed verdicts entered by McConnell, Judge, at the September 1973 Session of Superior Court held in MOORE County.

Lewis v. Fowler

This litigation arises from a three-car collision which occurred on the night of 3 February 1971 when two of the cars skidded on the icy pavement of a bridge which carries U. S. Highway 15-501 over railroad tracks near Aberdeen, N. C. Each driver denies negligence on his part and contends the collision was caused by negligence of the other drivers. Plaintiff seeks recovery from all defendants for property damages to his automobile. Defendants Fowler seek recovery for property damages to their vehicle, and its driver, Henry Roy Fowler, seeks recovery for his personal injuries by counterclaims against the plaintiff and by cross-actions against defendants Cranford and Bobby Butts Buick, Inc. Defendant Cranford, driver of a car belonging to Bobby Butts Buick, Inc., seeks recovery for personal injuries and Bobby Butts Buick, Inc. seeks recovery for property damages by counterclaims against the plaintiff.

At the close of plaintiff's evidence, the court allowed motion by defendants Fowler for a directed verdict as to the claim of plaintiff against them on the ground that plaintiff had failed to present any evidence of actionable negligence on the part of the driver of the Fowler vehicle. At the close of all of the evidence and after argument of counsel, but before the charge of the court to the jury, the court directed verdicts against all remaining claims, counterclaims, and cross-claims. All parties appealed.

Johnson, Poole & Crockett by Samuel E. Poole, William D. Sabiston, Jr., and Hurley E. Thompson, Jr., for plaintiff appellant-appellee.

Pittman, Staton & Betts by J. C. Pittman for defendants Henry Roy Fowler and Elise Carmichle Fowler, appellants-appellees.

Cashwell & Ellis by B. Craig Ellis; and Teague, Johnson, Patterson, Dilthey & Clay by Grady S. Patterson, Jr., for defendants Evelyn Pace Cranford and Bobby Butts Buick, Inc., appellants-appellees.

PARKER, Judge.

Since in passing on a motion for directed verdict the evidence must be considered in the light most favorable to the party against whom the motion is made, in this case we are called on to consider the evidence from three distinct points of view. Before doing so, however, certain underlying facts, as

Lewis v. Fowler

to which there is no substantial conflict in the evidence, are summarized as follows:

U. S. Highway 15-501 is a two-lane paved road which, at the scene of the accident, runs generally east-west and crosses over railroad tracks by a concrete bridge. This bridge is 213 feet long and 26 feet wide. On either side of the bridge the highway is paved to a width of 22 feet, and on each side of the pavement there are 8-foot-wide dirt shoulders flanked by steel guardrails, the dirt shoulders gradually narrowing as the guardrails swing inward toward the bridge abutments. Approaching the bridge from the east, the highway is straight and almost level for more than 400 feet and enters upon and continues across the bridge in a straight line and upon a slight downgrade. Proceeding westward from the bridge, the downgrade increases slightly and the highway curves gradually to the right. The posted speed limit in the area where the bridge is located is 45 miles per hour.

The accident occurred in the dark at approximately 6:35 p.m. on 3 February 1971. Sleet had been falling since 6:15 p.m., leaving the highway surface wet and the bridge surface icy. Prior to the accident involving the three vehicles of the parties to this litigation, a fourth car, not directly involved in the collision, had come on the scene. This car, a 1969 Chevrolet referred to in the evidence as the "Marks" car, had apparently gone out of control while traveling west across the bridge and came to rest at an angle to the highway with its front bumper hooked against the guardrail on the right side of the highway going west. The front of the Marks car was on the right shoulder of the road, the front bumper resting on or hooked against the guardrail and the rear of the car protruding onto and partially blocking the westbound traffic lane of the highway. As hereinafter noted, the evidence is conflicting as to the extent to which the Marks car blocked the westbound traffic lane, and is conflicting as to whether the Marks car was either "partly on and partly off the bridge" or at various distances, ranging from 20 feet to 50 or 60 feet, westward from the west end of the bridge.

Plaintiff Lewis, approaching the bridge from the west, saw the Marks car lodged against the guardrail and stopped his Ford Mustang near to or across from the Marks car, pulling several feet onto the grassy shoulder of the eastbound traffic lane but remaining partially in the eastbound traffic lane itself. A 1969 Ford pickup truck, driven by defendant Henry Fowler,

Lewis v. Fowler

drove onto the bridge from the east, went into a sideways skid on the bridge's icy surface, and came to rest at the western end of the bridge without hitting anything, but blocking both lanes of traffic. A 1970 Pontiac, driven by defendant Evelyn Cranford and owned by Bobby Butts Buick, Inc., which was proceeding westward and had been following behind the Fowler pickup truck, crashed into the pickup truck, knocking it into the Lewis automobile. The resulting personal injuries and property damage, for purposes of this appeal, are not in dispute and need not be considered.

[1] We first consider the court's ruling, made at the close of plaintiff's evidence, which granted defendant Fowlers' motion for directed verdict on plaintiff's claim against them on grounds that plaintiff had failed to produce any evidence of actionable negligence on the part of defendant Henry Fowler. For this purpose we view plaintiff's evidence in the light most favorable to the plaintiff. Plaintiff's evidence, in addition to showing the undisputed facts narrated above, added the following details: The front of the Marks car had come to rest sitting at an angle and facing northwest against the guardrail on the right side of the highway going west and at a point approximately 50 or 60 feet west of the west end of the bridge. The left rear portion of the Marks car, including its left rear tire, was still on the highway, partially blocking the westbound traffic lane. The taillights of the Marks car were on. Lewis approached the Marks car from the west, and, pulling to his right so that the right tires of his car were on the grassy shoulder, stopped directly across from the Marks vehicle in order that his daughter, a passenger with him in the Mustang, might see it. At this time there was no visible traffic approaching from the east. After pausing several moments opposite the Marks car, Lewis started slowly eastward toward the bridge, gradually pulling out into the eastbound traffic lane. After going about halfway between the Marks car and the bridge, Lewis saw the headlights of a vehicle entering the east end of the bridge. He immediately stopped his Mustang, which remained partially on the shoulder. The approaching vehicle, the Fowler pickup truck, began to skid sideways on the icy surface of the bridge, its rear "fishtailing" into the eastbound lane so that the truck blocked both lanes when it came to rest, sitting crossways, facing northward, on and at the west end of the bridge and at a point about 20 feet in front of the Lewis Mustang. After the pickup truck had come to a stop for "just a few seconds," and

Lewis v. Fowler

as its driver was attempting to move it from its stopped position, the truck was hit on its right side by the Pontiac driven by Evelyn Cranford. The blow spun the truck around and knocked it 20 feet into the left-hand front of the Lewis Mustang, resulting in plaintiff's damages.

When viewed in the light most favorable to the plaintiff, this evidence was insufficient to show that defendant Henry Fowler's actions constituted actionable negligence. There was no evidence that Fowler was exceeding either the posted speed limit or a speed which was safe given the inclement weather and time of night. There was no evidence Fowler failed to keep a proper lookout. Fowler's decision to stop his truck rather than attempt to "thread the needle" by passing through the space between the stopped Marks and Lewis vehicles, which, blocked, respectively, portions of the westbound and eastbound traffic lanes, may have been the only prudent course under the circumstances, and, in any event, certainly did not furnish evidence of negligence on his part. The evidence shows that Fowler was in fact able to bring his vehicle to a stop without striking anything and at a point 20 feet away from the Lewis car. "The skidding of a motor vehicle while in operation may or may not be due to the fault of the driver," *Hardee v. York*, 262 N.C. 237, 136 S.E. 2d 582, and in this case the mere fact that, in what appears to have been little more than a controlled skid, Fowler skidded while coming to a stop, does not, in itself, constitute evidence of negligence under the circumstances here shown. All of the evidence shows that after he successfully brought his truck to a stop without causing any damage, Fowler immediately undertook to move it from its position blocking traffic at the west end of the bridge and was prevented from doing so only because, in "just a few seconds," his truck was struck by the Cranford car. There being no evidence of actionable negligence on the part of Fowler, judgment directing verdict against plaintiff on his claim against the Fowlers, was properly entered.

[2] We next consider the court's rulings directing verdicts in favor of defendants Cranford and Bobby Butts Buick, Inc., on plaintiff Lewis's claim and defendant Fowlers' cross-claims against them. In this connection we view the evidence in the light most favorable to the claimants. When so viewed, we find the evidence sufficient to support, but certainly not to compel, a verdict finding defendant Cranford guilty of actionable negligence causing plaintiff's and defendant Fowlers' damages.

Lewis v. Fowler

There was evidence that the lights on both the Marks car and plaintiff's car were on and that plaintiff's headlights were shining in the direction from which Cranford was coming, yet she testified that she never saw either the Marks car or plaintiff's car until after the collision. Whether her view of those vehicles was blocked by the intervening pickup truck of the Fowlers was a question for the jury. As Mrs. Cranford approached the bridge from the east, she had an unobstructed view in a straight line over an almost level road for more than 400 feet and then continuing in the same line for an additional 213 feet across the bridge, yet her own evidence was that she did not see even the Fowler pickup truck until she had already started across the bridge. On this evidence the jury could find that she failed to keep a proper lookout in failing to see what was in front of her to see until after she had already entered upon the icy surface of the bridge. Only then did she begin to apply her brakes. When her car "skidded just a little bit," she tried to apply her brakes more, but then, realizing for the first time that she was on ice, she did not try to use her brakes anymore but simply held her car in the westbound traffic lane until it hit the Fowler truck. Despite such efforts as she had made to slow her car after she realized the truck was blocking her path, at the time of impact her car was still moving at a speed sufficient to knock the truck out of her lane and send it spinning some twenty feet away, and even then her car continued for a substantial distance down the highway. The very force of the collision is some evidence from which the jury might find that she was driving at a speed greater than was reasonable and prudent under the circumstances. It may well be that Mrs. Cranford exercised all due care, but whether she did or not was for the jury to decide. The court erred in directing verdicts against the claim of plaintiff and the cross-claims of the Fowlers to recover from Cranford and Bobby Butts Buick, Inc.

[3] Finally, we consider the directed verdicts in favor of plaintiff and against the counterclaims filed against him by all defendants. Taken in the light most favorable to defendants, the evidence indicated that the Marks car had come to rest very near to and no more than 20 feet beyond the west end of the bridge against the westbound traffic lane's guardrail, blocking a sizable portion of the westbound traffic lane. Plaintiff Lewis had stopped his Mustang opposite the Marks car, blocking most of the eastbound traffic lane. Before stopping to show his daughter the distressed Marks vehicle, Lewis, who had been

Lewis v. Fowler

waiting in the neighborhood for his daughter to finish a music lesson, had been told that the Marks car had skidded on the bridge and slid into the guardrail. Before picking up his daughter, Lewis had driven twice over the bridge in order to see the Marks vehicle for himself, noticing in the process that the bridge's surface was icy. He then drove to pick up his daughter, and returned to the bridge for the express purpose of showing her "what ice could do." On this evidence, we think that a jury would be warranted, but certainly not compelled, in finding that plaintiff Lewis was negligent in stopping his automobile virtually abreast of the Marks car so that both traffic lanes were substantially blocked by the two vehicles, and that this negligence was the proximate cause of defendants' injuries and property damages. It was reasonably foreseeable that a substantial blockage of both traffic lanes immediately to the west and downgrade from the icy bridge could cause a pile up of vehicles which were crossing the bridge from the east. Accordingly, the trial court erred in directing verdicts against defendants on their counterclaims against plaintiff Lewis.

The result is:

On plaintiff's appeal from the order directing verdict against him on his claim against defendants, Henry Roy Fowler and Elise Carmichle Fowler,

Affirmed.

On plaintiff's appeal from the order directing verdict against him on his claim against defendants Evelyn Pace Cranford and Bobby Butts Buick, Inc., and on the appeals of all defendants from the orders directing verdicts against them on their respective counterclaims and cross-actions, the orders directing verdicts are reversed and the case is remanded for a

New trial.

Judges VAUGHN and CARSON concur.

State v. Thomas

STATE OF NORTH CAROLINA v. EARNEST RAY THOMAS

No. 748SC342

(Filed 3 July 1974)

1. Automobiles § 113— involuntary manslaughter — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for involuntary manslaughter growing out of an automobile collision.

2. Automobiles § 46— opinion testimony as to speed

In this prosecution for involuntary manslaughter, the trial court did not err in allowing several witnesses to testify as to the speed of defendant's vehicle prior to the accident where the record shows that each such witness had ample opportunity for observation of defendant's automobile.

3. Criminal Law § 75— investigation of accident — interrogation in hospital emergency room — absence of Miranda warnings

Defendant was not subjected to "custodial interrogation" and was thus not entitled to be given the *Miranda* warnings when highway patrolmen investigating an automobile collision questioned defendant in a hospital emergency room for the purpose of obtaining information to fill out an accident report, and defendant's statement during such interrogation that he was driving a car involved in the collision was properly admitted in his trial for involuntary manslaughter although he had not been given the *Miranda* warnings.

4. Criminal Law § 144— amendment of judgments by clerk of court— absence of authority

The clerk of superior court had no authority to amend judgments imposed in criminal cases notwithstanding the trial court entered an order "that the judgments be amended in accordance with the remembrance of the Court Clerk."

5. Criminal Law § 138— more severe sentence upon retrial

Where defendant was awarded a new trial upon appeal of convictions for three offenses of involuntary manslaughter, the trial court at defendant's second trial erred in imposing sentences which in the aggregate are more severe than the sentences imposed at the first trial without giving sufficient reasons therefor.

APPEAL by defendant from *James, Judge*, 8 October 1973 Session of Superior Court held in GREENE County.

This is a criminal action wherein the defendant, Earnest Ray Thomas, was charged in three separate bills of indictments, proper in form, with involuntary manslaughter arising out of an automobile accident on 5 February 1971. Upon arraignment, the defendant entered a plea of not guilty as to all charges; and

State v. Thomas

the State offered evidence which tended to establish the following:

On 5 February 1971, at about 6:25 p.m., the defendant was operating an automobile on highway 264 in Greene County and was traveling in an easterly direction. According to the testimony of several persons, the defendant was operating his vehicle at speeds greater than seventy miles per hour and was pulling in and out of traffic. As defendant pulled out into the left lane to pass a vehicle in front of him, he crashed head-on into an automobile traveling west on highway 264. The parties stipulated that as a result of this accident, Linda Arrington and Ann Tort, both of whom were riding in the car headed in a westerly direction, and Jeffrey Fogel, who was riding with the defendant, were killed. The posted speed limit at the scene of the accident was 50 miles per hour for trucks and 60 miles per hour for cars. After the collision, the defendant, who remained pinned in his automobile under the steering wheel for some length of time, was detected to have an odor of alcohol on his breath; but the evidence introduced by the State did not reveal that he was under the influence of intoxicating liquor.

Defendant offered evidence which, in substance, tended to show that at the time of the accident the vehicle was being driven, not by defendant, but by Jeffrey Fogel, and that defendant was riding on the right side of the front seat.

From verdicts of guilty as to all three counts of involuntary manslaughter and judgments imposed thereon, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Robert R. Reilly for the State.

Turner and Harrison by Fred W. Harrison for defendant appellant.

HEDRICK, Judge.

[1] The defendant contends that the trial court erred in failing to grant his motion for judgment as of nonsuit. Defendant raised this same question in a former appeal of this case reported in 17 N.C. App. at page 8, and at that time the court held that there was sufficient evidence to require submission of the case to the jury. The evidence presented at the second trial being

State v. Thomas

substantially the same as that presented at the first trial, we adhere to the previous determination of the question.

[2] Defendant also contends that the trial court committed error when it allowed several witnesses to testify as to the speed of defendant's vehicle prior to the tragic accident.

"The general rule is that 'any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed' of a motor vehicle. But the opportunity to observe must have been one which the Court considers adequate, and where the only basis for the opinion of the witness was a momentary glimpse under unfavorable conditions, his testimony should be excluded." Stansbury's North Carolina Evidence (Brands Rev.), Vol. 1, § 131, pp. 420-1.

The record discloses that each of the witnesses who testified as to the speed of defendant's vehicle had ample opportunity for observation and, thus, were competent to testify as to the rate of speed.

[3] Next, defendant asserts that the trial court erred in failing to suppress statements made by the defendant to the investigating officers prior to being given the *Miranda* warnings. The statements were made in response to a series of questions asked by two highway patrolmen of defendant, while the latter was being treated for injuries in the Wilson County Memorial Hospital Emergency Room. During the course of the questioning, the defendant admitted being the driver of the car; however, he later repudiated this incriminating statement and now claims that another passenger in the car was driving at the time of the accident.

Defendant, relying upon *Howard v. State*, 44 Ala. App. 595, 217 So. 2d 548 (1969) and *Vandergriff v. State*, 219 Tenn. 302, 409 S.W. 2d 370 (1966), submits that the interrogation in the emergency room was a custodial interrogation and that the defendant should have been apprised of his fifth and sixth amendment rights as vouchsafed by *Miranda v. Arizona*, 384 U.S. 436 (1966). Conversely, the State maintains that the questions asked by the patrolmen were posed in the investigatory stage (not custody stage) and "that *Miranda* operates in all its full glory only when the accused is in fact in some sort of police custody." *State v. Brunner*, 211 Kan. 596, 507 P. 2d 233

State v. Thomas

(1973). In order to resolve this question, it is necessary to depict the circumstances surrounding the interrogation. The findings of fact made by the trial judge at the conclusion of the *voir dire* (held to determine the admissibility of defendant's statements) detail the events of the questioning as follows:

"That on the 5th day of February, 1971, Trooper J. P. Whitehurst was called upon to investigate this accident occurring on Highway 264, Greene County; that he made an initial collision-scene investigation; that at that time he gathered such information about the accident as was available; that during this on-the-scene investigation, he did not talk to any eyewitness to the accident; that on the collision date, Trooper Whitehurst didn't talk to anyone who could tell him how and why the accident occurred; that Sergeant Louis Taylor arrived at the scene of the accident at about 7:00 o'clock p.m. to assist Trooper Whitehurst; that Taylor stayed at the wreck scene approximately one hour, working traffic; that Taylor likewise didn't talk to anyone who could tell him how and why the accident occurred; that indeed the Sergeant didn't talk with any witnesses at the scene; that at approximately 8:30 p.m., Trooper Whitehurst and Sergeant Taylor together went to the Wilson Memorial Hospital; THAT THESE OFFICERS WENT THERE FOR THE SPECIFIC PURPOSE OF TALKING TO THE WRECK VICTIMS TO SEE IF THEY COULD DETERMINE THE DRIVERS OF THE RESPECTIVE VEHICLES INVOLVED AND TO SECURE THE NECESSARY INFORMATION FOR AN ACCIDENT REPORT; THAT THE CAUSE OF THE ACCIDENT WAS UNKNOWN TO THESE OFFICERS AT THIS TIME; that the officers proceeded directly to the emergency room where the wreck victims were located; that the Wilson County Memorial Hospital Emergency Room is a room approximately 30 feet by 30 feet; that at this time there were approximately 15 persons in the emergency room exclusive of Whitehurst and Taylor; that these 15 people were nurses, doctors, patients, and wreck victims; that in addition to those persons there were only two law enforcement officers present—i.e., Whitehurst and Taylor; THAT THESE OFFICERS HAD PLANNED TO TALK WITH ALL THE WRECK VICTIMS, but after talking with the doctors, they talked only with the McMillian girl and the defendant; * * * THAT AT THE TIME THOMAS WAS FIRST TALKED TO, THESE OFFICERS HAD NO KNOWLEDGE AS TO THE ACCIDENT'S CAUSE, AND WERE STILL IN

State v. Thomas

THE PROCESS OF FILLING OUT THE ACCIDENT REPORT; THAT AT THE TIME THE OFFICERS TALKED WITH THE DEFENDANT, HE WAS NOT BEING TREATED FOR HIS INJURIES, although he had been severely injured; that he was not warned of his Miranda rights by either officer; THAT HE WAS TOLD BY SERGEANT TAYLOR THAT THE OFFICERS WERE SEEKING TO SECURE INFORMATION TO ENABLE THEM TO FILL OUT AN ACCIDENT REPORT, AND TO NOTIFY NEXT OF KIN, ETC.; THAT THESE WERE TRUE AND ACCURATE STATEMENTS OF FACT ON BEHALF OF THESE OFFICERS; * * *

* * * THAT AT THIS TIME THE DEFENDANT WAS FREE TO GO AT HIS PLEASURE SO FAR AS THE OFFICERS WERE CONCERNED; THAT THESE OFFICERS HAD NO INTENTIONS OF ARRESTING THE DEFENDANT FOR ANY CRIME; THAT THE DEFENDANT KNEW HE WAS IN THE EMERGENCY ROOM OF A HOSPITAL; THAT THE DEFENDANT WAS COHERENT IN THOUGHT AND SPEECH; THAT HE WAS NOT NOTICEABLY SEDATED OR UNDER THE INFLUENCE OF ANY ALCOHOL OR NARCOTIC DRUGS, ALTHOUGH AN ODOR OF ALCOHOL WAS DETECTABLE ON HIS PERSON; THAT THE DEFENDANT KNEW WHAT WAS GOING ON AROUND HIM; THAT HE KNEW HE WAS TALKING TO LAW ENFORCEMENT OFFICERS; THAT THE DEFENDANT DIDN'T SEEM TO BE IN SEVERE PAIN; THAT HE COMPREHENDED WHAT SERGEANT TAYLOR TOLD HIM; THAT AT THIS TIME THE DEFENDANT TALKED INTELLIGENTLY; THAT HE WAS IN THE POSSESSION OF HIS MENTAL AND PHYSICAL FACULTIES ALTHOUGH HE WAS INJURED; THAT THE DEFENDANT'S FREEDOM OF ACTION AT THIS TIME WAS NOT RESTRICTED BY LAW ENFORCEMENT PERSONNEL IN ANY SIGNIFICANT WAY OR IN ANY WAY; that Sergeant Taylor asked the defendant what happened, and the defendant replied he didn't know; that up to that moment, Sergeant Taylor and Trooper Whitehurst had been unable to determine why the accident had occurred; THAT SERGEANT TAYLOR THEN ASKED HIM WHO WAS DRIVING THE OLDSMOBILE AT THE TIME OF THE ACCIDENT, AND THE DEFENDANT SAID HE WAS; THAT ADDITIONALLY THE DEFENDANT SAID FOGEL WAS SEATED IN THE MIDDLE AND JIMMY THOMAS IN THE RIGHT FRONT PASSENGER'S SEAT; * * *

* * * THAT AFTER TALKING WITH THE DEFENDANT, THE OFFICERS DIDN'T IMPEDE THE DEFENDANT'S FREEDOM OF ACTION IN ANY WAY, NOR DID THEY GIVE ANY ORDER

State v. Thomas

TO ANYONE THAT THE DEFENDANT WAS NOT FREE TO REMOVE HIMSELF FROM THE HOSPITAL AT HIS PLEASURE; THAT THE DEFENDANT AT THIS TIME WAS FREE TO DO AS HE WISHED OR TO COMMAND OTHERS TO DO FOR HIM; * * *

We are of the opinion, as was the trial judge, that these facts do not constitute "custodial interrogation" since the atmosphere and physical surroundings during the questioning manifest a lack of restraint or compulsion. This conclusion finds support in the decisions of other jurisdictions which have been confronted with this same question. *State v. Sandoval*, 92 Idaho 853, 452 P. 2d 350 (1969); *People v. Gilbert*, 8 Mich. App. 393, 154 N.W. 2d 800 (1967); *People v. Phinney*, 22 N.Y. 2d 288, 292 N.Y.S. 2d 632, 239 N.E. 2d 515 (1968); *State v. Zucconi*, 50 N.J. 361, 235 A. 2d 193 (1967); *State v. Lopez*, 79 N.M. 282, 442 P. 2d 594 (1968). See also, *United States v. Mackiewicz*, 401 F. 2d 219 (2nd Cir. 1968), cert. denied 393 U.S. 923 (1968). Moreover, the United States Supreme Court in *Miranda*, *supra*, at p. 477, stated, "Our decision is not intended to hamper the traditional function of police officers in investigating crime."

Furthermore, we are not persuaded by the cases which defendant has cited as support for his argument. In *Howard v. State*, *supra*, the Alabama Court determined that a hospitalized suspect was in custody because the defendant *had been taken there by the police* (emphasis added), and the court further emphasized that he was not free to leave without the likelihood of police intervention. These circumstances are clearly different from those present in the instant case. As to the other case relied upon by defendant, *Vandergriff v. State*, *supra*, a Tennessee Court found "custodial interrogation" from the "mere fact that the hospitalized person was suspected of being the driver of the death car; his freedom of activity or restraints thereof were not deemed relevant." We admit that *Vandergriff* is more difficult to distinguish than *Howard*; however, we agree with the following criticism of *Vandergriff* contained in *State v. Brunner*, *supra*, at p. 237.

"If we read *Miranda* correctly, and especially the text and note quoted above, this is a wholly unwarranted extension of the 'focusing' language of *Escobedo*. We think *Miranda* clearly says that there must be some police-instigated restraint before a suspect can be regarded as being in the custody of the officers."

State v. Thomas

Thus, the defendant was not entitled to be given the *Miranda* warnings; and, therefore, this assignment of error is overruled.

Defendant contends that the trial court erred in sentencing him upon retrial to terms greater than he received at the first trial. Perhaps a proper understanding of our disposition of this question can best be obtained by a brief review of some of the history of this case. Defendant was tried, convicted, and sentenced for three counts of involuntary manslaughter on 5 February 1971. The case was appealed to this court and in *State v. Thomas*, 17 N.C. App. 8, 193 S.E. 2d 450 (1972), defendant was granted a new trial (for reasons not pertinent in this appeal). In the prior record on appeal (No. 728SC665) the judgment on each count appears as follows:

"JUDGMENT AND APPEAL ENTRIES

Judgment of Court: 71CR238

It is adjudged that the defendant be imprisoned in the State's Prison for the term of two years. This sentence to run at the expiration of sentence in 71CR339.

Judgment of Court: 71CR338

It is adjudged that the defendant be imprisoned in the State's Prison for the term of two years. This sentence to run at the expiration of 71CR238.

Judgment of Court: 71CR339

It is adjudged that the defendant be imprisoned in the State's Prison for a term of two years. This sentence to run at the expiration of 71CR338."

Prior to the disposition of the first appeal of this case by this Court, the State filed a Motion Suggesting Diminution of the Record because the trial court (Cowper, Judge) had signed an order directing "that the judgments be amended in accordance with remembrance of the Court Clerk" The defendant filed an answer opposing the motion, but this Court allowed the motion and ordered that the order, the motion, the answer, and the certified copies of judgments and commitments be reproduced as an addendum to the record. The addendum to the record indicates that the judgments were amended *by the Clerk* pursuant to Judge Cowper's order to provide that defendant be

State v. Thomas

imprisoned for a period of two years on each count, said sentences to run consecutively.

After defendant's conviction at the second trial, the trial judge entered judgments as follows: In 71CR338, prison sentence of not less than three nor more than four years; in 71CR339, prison sentence of not less than three nor more than four years, to begin at completion of sentence in 71CR338; and in 71CR238, prison sentence of not less than two nor more than three years to run concurrent with sentence imposed in 71CR339.

While we find no error in the second trial, the judgments entered at the second trial and appealed from are vacated and this cause is remanded to the superior court with the following directions:

[4] (1) After notice to defendant, his counsel and the solicitor, the court will conduct a hearing and make a determination as to the judgments the trial judge intended to enter at the first trial. Notwithstanding Judge Cowper's order, the Clerk of the Superior Court of Greene County was without authority to amend the prior judgments. The court will then correct the record to speak the truth with respect to the prior judgments.

[5] (2) Following said determination and correction, the court will enter new judgments against defendant, which judgments, in the aggregate, will not be more severe than the judgments which the court determines were intended to be entered at the first trial. It is clear that the judge at the first trial did not intend to impose sentences exceeding six years; the judgments entered at the second trial were more severe and the reasons given by the judge at that trial do not satisfy the requirements set forth in *North Carolina v. Pearce*, 395 U.S. 711 (1969).

In summary, we find no error in defendant's second trial; but, for the reasons stated, the judgments entered thereat are vacated and the cause is remanded for appropriate judgments consistent with this opinion.

Remanded.

Judges BRITT and CARSON concur.

State v. Pollock

STATE OF NORTH CAROLINA v. HAROLD ROGER POLLOCK

No. 743SC340

(Filed 3 July 1974)

1. Criminal Law § 75— arrest for drunken driving — in-custody interrogations — applicability of Miranda rules

Where defendant was placed under arrest for drunken driving and was transported to the police station in a police car, interrogation of defendant at the police station constituted an in-custody interrogation requiring compliance with the *Miranda* decision.

2. Criminal Law § 75— Miranda rules — applicability to motor vehicle violation

The *Miranda* requirements are not inapplicable to all motor vehicle violations.

3. Criminal Law § 76— incriminating statements — necessity for voir dire

Where defendant in a drunken driving case entered a general objection to the admission of incriminating statements made by him during in-custody interrogation, the trial court erred in failing to conduct a *voir dire* to ascertain whether defendant had been given the *Miranda* warnings and whether the statements were voluntarily and understandingly made after defendant knowingly and intelligently waived his rights.

APPEAL by defendant from *Bailey, Judge*, 3 December 1973, Session of Superior Court held in CARTERET County. Heard in the Court of Appeals 9 April 1974.

This is a criminal action wherein the defendant, Harold Roger Pollock, was charged in a warrant, proper in form, with operating a motor vehicle on a public street or highway while under the influence of intoxicating liquor. The defendant was originally tried in the District Court of Carteret County upon a plea of not guilty and was found guilty of driving under the influence, first offense. The defendant appealed to the Superior Court where at trial the State offered evidence tending to show the following.

On 25 August 1973, at 12:30 a.m., C. R. Askew, a highway patrolman, observed the defendant driving a 1968 Plymouth car on old highway 70 and traveling in an easterly direction. Officer Askew followed the defendant for a brief period of time. While following him, he observed the defendant weave across the center line on three separate occasions. As the defendant turned

State v. Pollock

into his driveway, the officer turned on his blue light and siren. Upon approaching the vehicle the patrolman observed that defendant had the odor of alcohol about him; that his eyes were red and glassy; that his face was flushed; and, that he was unsteady on his feet. While defendant was searching for his registration card, the defendant's brother arrived in his truck and started giving the patrolman "a hard time". The patrolman then radioed the Newport Police Department for assistance and upon arrival of another police officer, the defendant and his brother were placed under arrest. At the police station the defendant was asked to perform certain tests including a balance test, a walking test, and a finger-to-nose test. In the first two tests the defendant swayed noticeably, while in the finger-to-nose test, the defendant failed to touch his nose. Defendant was also asked several questions and was administered the breathalyzer test. The results of the breathalyzer test were .11 by weight of alcohol in the person's blood.

The defendant, testifying in his own behalf, admitted drinking several beers; however, he stated that he did not have anything to drink after leaving the Moose Lodge at 9 or 10 p.m.

The jury found the defendant guilty and from a judgment imposing a fifteen (15) days' sentence in the common jail of Carteret County, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney John R. Morgan for the State.

Wheatly & Mason, P.A., by L. Patten Mason for defendant appellant.

HEDRICK, Judge.

[1] Defendant asserts that the trial court committed error by allowing the patrolman to testify, over defendant's objection, as to incriminating statements made by defendant following his arrest without first conducting a voir dire to ascertain (1) whether these inculpatory remarks were made after the so-called "Miranda Warnings" were given, and (2) whether the Statements were voluntarily and understandingly made after defendant knowingly and intelligently waived his rights. The

State v. Pollock

incriminating statements by defendant were in response to a series of questions asked by the patrolman and are as follows:

“Q. State whether or not you asked the defendant if he had had anything to drink.

Objection.

Court: Overruled.

DEFENDANT'S EXCEPTION No. 2

A. Yes, sir, I did.

Q. What, if anything, did he tell you?

Objection.

Court: Overruled.

DEFENDANT'S EXCEPTION No. 3

A. He said, 'Beer'.

Q. State whether or not you asked him how much.

Objection.

Court: Overruled.

DEFENDANT'S EXCEPTION No. 4

A. Yes, sir, I did.

Q. What did he tell you?

A. 8 cans.

Move to Strike.

Court: Denied.

DEFENDANT'S EXCEPTION No. 5

Q. State whether or not you asked him where he had drunk the beer.

Objection.

Court: Overruled.

DEFENDANT'S EXCEPTION No. 6

A. Yes, sir, I did.

State v. Pollock

Q. What, if anything, did he tell you?

A. He said, 'Newport'.

Q. State whether or not you asked him when he started drinking the beer.

Objection.

Court: Overruled.

DEFENDANT'S EXCEPTION NO. 7

A. Yes, sir, I did.

Q. What did he tell you?

A. He said, 'Five o'clock'.

Q. State whether or not you asked him when he had stopped drinking the beer.

Objection.

Court: Overruled.

DEFENDANT'S EXCEPTION NO. 8

A. Yes, sir, I did.

Q. What did he tell you?

A. He said, 'When you caught me'.

Q. After you had asked him these questions, Officer Askew, state whether or not you asked the defendant whether or not he was under the influence of an intoxicating beverage.

Objection.

Court: Overruled.

DEFENDANT'S EXCEPTION NO. 9

A. Yes, sir, I did.

Q. What did he tell you?

A. He said, 'I guess I am'.

DEFENDANT'S EXCEPTION NO. 10"

State v. Pollock

While defendant contends that these statements were in effect a confession and that they were the product of a custodial interrogation and that a voir dire should have been conducted, the State submits that the questions asked by the patrolman were merely incidental to a general investigation and not in custody interrogation requiring compliance with *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Furthermore, the State, citing *State v. Tyndall*, 18 N.C. App. 669, 197 S.E. 2d 598 (1973) and *State v. Beasley*, 10 N.C. App. 663, 179 S.E. 2d 820 (1971), maintains that the Miranda warnings are not applicable in a motor vehicle case, and that thus, there was no need to conduct a *voir dire* to determine if such warnings were given.

The United States Supreme Court, in the *Miranda* decision defined a custodial interrogation as one "initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action." Although we are cognizant of the investigatory stage exception carved out in *Miranda*, we are unable, in light of the factual context of this case, to understand how the State can argue that the statements elicited from defendant were not made during an in custody interrogation. The facts clearly reveal that defendant was arrested at the site where he had first been stopped; was transported to the Newport Police Station in a police car, and *was then* asked the questions which are the focal point of this assignment of error. Such circumstances dictate the conclusion that the defendant was in custody, under arrest, and deprived of his freedom in a significant way, and that the defendant was entitled to the *Miranda* warnings.

[2] Next, we must consider the State's contention that the *Miranda* warnings are inapplicable to motor vehicle violations. The main support for this argument is found in dictum which appears in *State v. Beasley*, 10 N.C. App. 663, 179 S.E. 2d 820 (1971). *Beasley* quoted with approval a New Jersey decision, *State v. Macuk*, 57 N.J. 1, 268 A. 2d 1 (1970), wherein the New Jersey court said: "[W]e are of the opinion that, in view of the absence of any indication to the contrary by the United States Supreme Court, the rules of *Miranda* should be held inapplicable to all motor vehicle violations."

State v. Pollock

In a recent decision of our Supreme Court, *State v. Sykes*, filed 10 April 1974, Justice Huskins, writing for the court made the following germane comment:

"We observe in passing that *State v. Beasley* [*supra*] and *State v. Tyndall* [*supra*], should not be interpreted to hold that the rules of *Miranda* are inapplicable to *all* motor vehicle violations. We said in *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971): 'One who is detained by police officers under a charge of driving under the influence of an intoxicant has the same *constitutional* and statutory rights as any other accused'. (Emphasis added.) We adhere to this view." *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974).

[3] Any extra-judicial statement of an accused is a confession if it admits defendant's guilt as to one of the vital parts of the offense charged. *State v. Williford*, 275 N.C. 575, 169 S.E. 2d 851 (1969); *State v. Hamer*, 240 N.C. 85, 81 S.E. 2d 193 (1954). In the case now before us, there can be no question but that the answers given by defendant to the police officer's questions qualify as a confession. From the earliest days of our judicial system, the North Carolina courts have recognized that an extra-judicial confession is admissible against a defendant when, and only when, it was, in fact, voluntarily and understandingly made. *State v. Roberts*, 12 N.C. 259 (1827). This proposition has been reaffirmed in more recent times. *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), cert. denied 386 U.S. 911 (1967); *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572 (1951); *State v. Moore*, 210 N.C. 686, 188 S.E. 421 (1936). The accepted procedure for determination of whether the confession was voluntarily and understandingly made is to conduct a voir dire in the absence of the jury. *State v. McRae*, 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Gray*, *supra*. Moreover, a general objection is sufficient to challenge the admission of a proffered confession if timely made, and upon such objection, the trial judge should dismiss the jury and conduct a voir dire hearing. *State v. Haynes*, 276 N.C. 150, 171 S.E. 2d 435 (1969). Thus, upon defendant's entering a general objection, the trial court was in error in not conducting a voir dire to determine if defendant had been given his *Miranda* warnings, and had voluntarily and understandingly made the incriminating statements only after freely and knowingly waiving his rights.

Defendant has other assignments of error which we do not discuss as they are not likely to recur on a new trial.

State v. Orange

We are of the opinion and so hold that the defendant is entitled to a new trial.

New trial.

Judges BRITT and CARSON concur.

STATE OF NORTH CAROLINA v. REV. J. E. ORANGE

No. 741SC404

(Filed 3 July 1974)

1. Indictment and Warrant § 6—arrest warrant—sufficiency of affidavit to support

An affidavit which stated that the affiant, the county sheriff, ordered a group to disperse from the county courthouse steps and that the affiant personally witnessed defendant's subsequent refusal to comply with the order was sufficient to support a warrant for defendant's arrest.

2. Constitutional Law § 18; Disorderly Conduct § 1—constitutionality of portion of disorderly conduct statute

G.S. 14-288.4(a)(2) which defines disorderly conduct as the use of any utterance, gesture, display or abusive language intended and likely to provoke violent retaliation and thereby cause a breach of the peace, when construed to prohibit only words and conduct likely to provoke ordinary men to violence, is not unconstitutionally vague under the First Amendment.

3. Constitutional Law § 30—belated motion for free transcript

Where defendant failed to make a timely request for a free transcript, he could not complain on appeal of the trial court's denial of his belated motion to be declared indigent.

4. Criminal Law § 50—use of word “trying”—no opinion testimony

The trial court did not err in allowing testimony of the sheriff and police captain describing a crowd as “trying” to push its way into the courthouse and police officers as “trying” to keep members of the crowd, including defendant, out of the courthouse, since the witnesses used the word in a purely descriptive sense, describing physical actions rather than the witnesses' opinions as to motivation.

5. Disorderly Conduct § 2—refusal to obey order to disperse—sufficiency of evidence

In a prosecution for a violation of G.S. 14-288.5 evidence was sufficient to be submitted to the jury where it tended to show that a law enforcement officer responsible for keeping the peace had reason-

State v. Orange

able grounds to believe that disorderly conduct by an assemblage of three or more persons was occurring at the time he issued the command to disperse, that the command was given in a manner reasonably calculated to be communicated to the assemblage of which defendant was a part, and that defendant wilfully refused to obey the command.

ON *Certiorari* to review defendant's trial before *Copeland, Judge*, 10 September 1973 Session of Superior Court held in CHOWAN County.

Defendant was charged in a warrant with unlawfully and willfully failing and refusing to disperse when commanded to do so by Sheriff Troy Toppin, a law enforcement officer responsible for keeping the peace, when said officer reasonably believed that disorderly conduct was occurring by the assemblage of three or more persons, a misdemeanor violation under G.S. 14-288.5. After trial and conviction in the district court, defendant appealed to the superior court, where he again pled not guilty. The State offered evidence tending to show: On the morning of 5 June 1973, approximately 30 Negroes were arrested in connection with a protest in Chowan County. They were taken to the "auditorium or seating area" of the Chowan County courthouse, in Edenton, N. C., for processing. While the arrested persons were still inside, approximately 30 or 35 additional Negroes approached the courthouse chanting "we want to get in the courthouse, we want to get in." Defendant, a former professional football player who was 30 years old, weighed 368 pounds, and was six feet three inches tall, was at the front of the crowd. When the crowd, which covered the entire front portion of the courthouse, reached the bottom of the three steps leading up to the front door, their path was blocked by several police officers. The members of the crowd, including the defendant, pushed against the riot sticks of the officers. Several times, Chowan County Sheriff Troy Toppin asked the group to disperse. Eight or ten persons obeyed, but twenty-one remained, chanting "we want to be arrested, go ahead and arrest us"; and "why can't we come in, we want to come in." These persons, including the defendant, who had remained at the front of the group, were then arrested. Although during the commotion it appears that defendant at one time slipped on the courthouse steps and fell to his knees, he received no injury, and the confrontation ended essentially without violence. The defendant testified to a similar version of events, although he stated that he had never pushed against the officers stationed at the courthouse door. He offered

State v. Orange

evidence to show that the group was seeking entry into the courthouse in order to protest and to investigate accusations of police brutality towards the previously-arrested Negroes.

The jury found defendant guilty as charged, and judgment was entered imposing an active six-month prison sentence. Defendant appealed. To permit perfection of the appeal, this Court subsequently issued writ of certiorari.

Attorney General Robert Morgan by Assistant Attorney General Ralf F. Haskell for the State.

Paul, Keenan & Rowan by Jerry Paul for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to the trial court's failure to grant his pretrial motion to quash the warrant. First, defendant argues that the affidavit in support of a warrant failed to indicate to the magistrate how the affiant became aware of the fact of defendant's alleged criminal activity. This contention is feckless. The affidavit states that Chowan County Sheriff Troy Toppin, the affiant himself, gave the order to disperse, and it is clear that he personally witnessed defendant's subsequent refusal to comply.

[2] Next, defendant contends that the warrant charges him with violation of an unconstitutional statute. This contention is also without merit. Defendant was charged with failing to disperse after having been commanded to do so by a law enforcement officer responsible for keeping the peace who had reasonable grounds to believe that disorderly conduct by an assemblage of three or more persons was occurring, a violation of G.S. 14-288.5. "Disorderly conduct" is in turn defined by the five subparagraphs of G.S. 14-288.4(a). G.S. 14-288.4(a) (3), (4) and (5) deal with behavior at public or private educational institutions and are hence irrelevant to the present inquiry. The remainder and relevant portions of G.S. 14-288.4(a) as amended in 1971, provide as follows:

"§ 14-288.4. *Disorderly conduct.*—(a) Disorderly conduct is a public disturbance intentionally caused by any person who:

"(1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence; or

State v. Orange

“(2) Makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace;”

Defendant offers no attack on G.S. 14-288.4(a) (1), the constitutionality of which would appear manifest. Defendant does contend that G.S. 14-288.4(a) (2) is unconstitutionally vague under the First Amendment. In *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569, however, our Supreme Court dealt with this very objection. In *Summrell*, the trial judge, dealing with G.S. 14-288.4(a) (2) as written prior to its revision in 1971 Session Laws, Chap. 668, Sec. 1, construed G.S. 14-288.4(a) (2) to prohibit only words and conduct likely to provoke ordinary men to violence. In approving the trial judge's construction, our Supreme Court said (282 N.C. at p. 168) :

“There can be no doubt that the General Assembly intended to prohibit ‘fighting words,’ words tending to cause an immediate breach of the peace wilfully spoken in a public place, and that [the trial judge's] interpretation accurately expressed the legislative purpose. At this point we note that the General Assembly by N. C. Sess. Laws, Ch. 668, § 1 (1971) . . . rewrote Section (a) (2) so that it now reads ‘[m]akes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace. . . .’ There is no substantial difference between the 1971 revision and the 1969 version of Section (a) (2) as [the trial judge] construed it.”

Defendant's additional argument that this language from *Summrell* is no longer constitutional under *Gooding v. Wilson*, 405 U.S. 518, 31 L.Ed. 2d 408, 92 S.Ct. 1103, is wide of the mark; *Gooding* was decided before and discussed in *Summrell*.

[3] Defendant next contends that the superior court erred in denying his motion to be declared indigent and be provided with a free transcript of the district court proceedings. The superior court denied defendant's motion on grounds that “the defendant is guilty of laches and has failed to move in apt time.” We agree with the trial court. Judgment in the district court imposing suspended sentence was entered on 31 July 1973. Defendant then appealed to the superior court for trial de novo, and on 22 August 1973 defendant's attorney telephoned and later that day

State v. Orange

met with the district attorney and the superior court judge assigned to hold court in Chowan County in September. At this meeting, defendant's counsel failed to request either indigency status or a free transcript for his client, and did not do so until, after one continuance, defendant's case came on for trial on 11 September 1973. Defendant failed to make a timely request for a free transcript and cannot now complain of the trial court's denial of his belated motion. See *State v. Clark*, 22 N.C. App. 81, 206 S.E. 2d 252.

[4] Defendant assigns error to the admission, over objection, of several portions of the testimony of Sheriff Toppin and Police Captain C. A. Williams, describing the crowd as "trying" to push its way into the courthouse and the police officers as "trying" to keep members of the crowd, including the defendant, out of the courthouse. It is clear that the witnesses used the word "trying" in a purely descriptive sense, describing physical actions rather than the witnesses' opinion as to motivation.

[5] Defendant assigns error to the trial court's denial of his motion for nonsuit at the close of all the evidence. In our opinion, the evidence, when taken in the light most favorable to the State, was sufficient to require submission of the case to the jury as to defendant's guilt or innocence of the offense with which he was charged. As pointed out in the opinion by Chief Judge Brock in *State v. Clark, supra*, "[u]nder G.S. 14-288.5, the failure to disperse when commanded by an officer would be an offense where no disorderly conduct was occurring so long as it is shown on trial that the officer had reasonable grounds to believe that disorderly conduct was occurring by an assemblage of three or more persons." Here, the evidence was amply sufficient to support a jury finding that Sheriff Toppin, a law enforcement officer responsible for keeping the peace, had reasonable grounds to believe that disorderly conduct by an assemblage of three or more persons was occurring at the time he issued the command to disperse, that the command was given in a manner reasonably calculated to be communicated to the assemblage of which defendant was a part, and that defendant willfully refused to obey the command. These were all of the elements required to support the jury's verdict finding defendant guilty as charged.

Finally, defendant assigns error to several portions of the jury charge, contending that the trial judge instructed the jury

In re Martin

as to unconstitutional statutes. Defendant's arguments hereunder, however, are essentially those referred to earlier in our discussion of the motion to quash the warrant, and need not be repeated here. Considered as a whole, the charge was free from prejudicial error.

We have also carefully examined all of defendant's remaining exceptions and assignments of error which are brought forward in his brief, and in the trial and judgment imposed we find

No error.

Chief Judge BROCK and Judge BAILEY concur.

IN THE MATTER OF: THE APPEAL OF MR. JAMES G. MARTIN, CHAIRMAN OF THE MECKLENBURG COUNTY BOARD OF COMMISSIONERS, FROM A DECISION OF THE MECKLENBURG COUNTY BOARD OF EQUALIZATION AND REVIEW EXEMPTING FROM TAX CERTAIN PROPERTY BELONGING TO ROSS LABORATORIES AND STORED IN THE PUBLIC WAREHOUSE IN CHARLOTTE AS OF JANUARY 1, 1971.

No. 7426SC272

(Filed 3 July 1974)

1. Taxation § 23—construction of tax statutes

Ambiguous tax statutes are construed against exemption and in favor of taxation, and a party asserting that he comes within the exceptions of a taxing statute has the burden of proof.

2. Taxation § 25—ad valorem taxation—goods from out of state—storage in public warehouse—goods not held for transshipment

Goods of a nonresident corporation which were shipped into this State with bills of lading designated "For Transshipment," stored in a public warehouse in unbroken cases for varying amounts of time until customers placed an order for the goods, and shipped by the warehouse by common carrier to the corporation's customers upon being so instructed by the corporation were not goods held "for the purpose of transshipment" within the meaning of G.S. 105-281 (now G.S. 105-275); consequently, they were subject to ad valorem taxation in the county in which they were stored.

APPEAL from *Hasty, Judge*, 16 April 1973 Session of MECKLENBURG County Superior Court.

In re Martin

Mecklenburg County assessed certain personal property of Abbott Laboratories, Inc., a foreign corporation, and Ross Laboratories (taxpayer), a division thereof, for ad valorem taxes for 1971. This property was located in a public warehouse in Mecklenburg County. The taxpayer appealed the assessment of taxes to the Mecklenburg County Board of Equalization and Review, which held that the property was subject to the provisions of G.S. 105-281 (now G.S. 105-275) and was, therefore, not subject to ad valorem taxation. The county appealed this decision to the State Board of Assessment, which upheld the County Board of Equalization and Review. This ruling was appealed to the Mecklenburg County Superior Court, which, likewise, affirmed the decision of the State Board of Assessment. Notice of appeal was given by the county.

The facts in this case have been stipulated. The property involved was manufactured by the taxpayer at plants outside North Carolina and shipped into the State by common carrier. It was shipped in carload lots to the Carolina Transfer and Storage Company, a public warehouse in Mecklenburg County. It was shipped in standard size cases which were stored at the warehouse. The cases remained unbroken at all times while in storage; and when eventually sold, they were not sold in lots smaller than a case. Each of the shipments was accompanied by an invoice and bill of lading which had on its face the words "For Transshipment" or "Transshipment". The ultimate consignees were not designated and were not known to the taxpayer when the goods were shipped into this state.

Throughout the year 1971, the office of the taxpayer in Atlanta, Georgia, would notify the warehouse as to the type of merchandise and the number of cases to be shipped and the identity of the consignee. Pursuant to these instructions, the warehouse would ship by common carrier to persons, firms, and corporations, both within and without the State, various numbers of cases of the products stored in the warehouse.

Ruff, Perry, Bond, Cobb, Wade and McNair, by Hamlin L. Wade for appellant Mecklenburg County.

Boyle, Alexander and Hord, by B. Irvin Boyle for appellee Ross Laboratories.

In re Martin

CARSON, Judge.

The taxpayer contends that its personal property is exempt from taxation by virtue of Chapter 1185 of the 1967 Session Laws amending G.S. 105-281 as follows:

“Personal property of nonresidents of the State in their original package or fungible goods in bulk, belonging to a nonresident of the State, shipped into this State and placed in a public warehouse for the purpose of transshipment to an out-of-state or within the state destination and so designated on the original bill of lading, or personal property of residents of the State in their original package and fungible goods in bulk, belonging to a resident of the State, placed in a public warehouse for the purpose of transshipment to an out-of-state destination and so designated on the original bill of lading, shall be, while so in the original package, or as fungible goods in bulk, in such warehouse, and they are hereby designated a special class of personal property and shall not be assessed for taxation. No portion of a premises owned or leased by a consignor or consignee, or a subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this Section despite any licensing as such. It is hereby declared to be the policy of this State to use its system of property taxation in such manner, through the classification of the aforementioned property, to encourage the development of the State of North Carolina as a distribution center. For purposes of this Section and this subchapter, the term “property, real and personal,” as used in the first paragraph of this Section, shall not include the property hereinabove in this paragraph so specially classified.”

Here, the goods of the taxpayer were in their original package, belonged to a nonresident, shipped into this State, placed in a public warehouse, and designated “For Transshipment” on the bill of lading. The only question to be determined is whether the goods were held for the purpose of transshipment, for the statute only applies to goods held for that purpose.

[1] It is well established in this jurisdiction that ambiguous statutes are construed against exemption and in favor of taxation. *Odd Fellows v. Swain*, 217 N.C. 632, 9 S.E. 2d 365 (1940); *In re Dickinson*, 281 N.C. 552, 189 S.E. 2d 141 (1972).

In re Martin

A party asserting that he comes within the exceptions of a taxing statute has the burden of proof. *Canteen Service v. Johnson, Comr. of Revenue*, 256 N.C. 155, 123 S.E. 2d 582 (1962); *Leasing Corp. v. High, Comr. of Revenue*, 8 N.C. App. 179, 174 S.E. 2d 11 (1970).

The taxpayer contends that his property is in the public warehouse for the purpose of transshipment. It contends that the goods are still in their original package and the bill of lading bears the words "For Transshipment". When they are sold by the taxpayer, the cases are not broken but are shipped in quantities no smaller than one case.

The county maintains that all goods placed in a public warehouse are placed there for some type of shipment out. It contends that the word "transshipment" is a word of art meaning a short delay in the shipping of goods in interstate commerce. It contends that since the ultimate designee is unknown at the time the goods are shipped to the warehouse, the taxpayer's construction of this statute would allow the taxpayer to ship large quantities of goods to this state and to allow these goods to have a tax free status while waiting for a purchaser.

We agree with the contentions of the county. To accept the contentions of the taxpayer would be to render meaningless the phrase "for the purpose of transshipment". The word "transshipment" evolved from maritime law. It applied to goods being taken from one ship and placed in another. It also covered goods temporarily stored on the pier while waiting to be loaded on the second ship. It was a temporary interruption of goods in transit while being moved from one carrier to another. Black's Law Dictionary, 4th Ed.

[2] We do not believe the goods in question under these stipulated facts were held for the purpose of transshipment. Their storage in the public warehouse was not a mere temporary break in the shipment of the goods. Rather, they were held for varying amounts of time until customers placed an order with the taxpayer for the delivery of the goods. Since the goods were not held for the purpose of transshipment, they were subject to ad valorem taxation in the county.

The judgment appealed from therefore is reversed.

Chief Judge BROCK and Judge MORRIS concur.

State v. Dilldine

STATE OF NORTH CAROLINA v. BILL DILLDINE

No. 7418SC472

(Filed 3 July 1974)

1. Assault and Battery §§ 11, 17—shooting of victim five times—one episode—one offense

Where the evidence tended to show that defendant and his victim exchanged words, defendant shot his victim three times in the wrist and abdomen, the victim turned to leave and defendant shot him twice in the back, it was improper to have two bills of indictment and two offenses of felonious assault growing out of the one episode.

2. Assault and Battery § 15—assault with deadly weapon with intent to kill—instructions

In a prosecution for assault with a deadly weapon with intent to kill where defendant was charged in two separate bills of indictment, the trial court's instructions which treated the two cases as being of different seriousness and which placed a lesser degree of proof upon the State than was necessary were sufficiently prejudicial to warrant a new trial.

APPEAL by defendant from *Crissman, Judge*, 19 November 1973, Regular Criminal Session, GUILFORD Superior Court (High Point Division).

Heard in the Court of Appeals 20 June 1974.

Defendant was charged in two separate bills of indictment with felonious assault. The first bill was returned 26 February 1973, Criminal Session, and was to the effect, "That *Bill Dilldine*, late of the County of Guilford, on the 22nd day of December 1972, with force and arms, at and in the County aforesaid, did, unlawfully, willfully and feloniously assault John Henry Seigler with a certain deadly weapon, to wit: a pistol, with the felonious intent to kill and murder the said John Henry Seigler inflicting serious injuries upon the said John Henry Seigler, to wit: by shooting him in the abdomen and wrist against the form of the Statute in such case, made and provided and against the peace and dignity of the State."

The second bill was returned 28 May 1973, Criminal Session, and was to the effect, "That *Bill Dilldine*, late of the County of Guilford, on the 22nd day of December, 1972, with force and arms, at and in the County aforesaid, did, unlawfully, willfully and feloniously assault John Henry Seigler with a certain deadly weapon, to wit: a pistol, with the felonious in-

State v. Dilldine

tent to kill and murder the said John Henry Seigler inflicting serious injuries upon the said John Henry Seigler, to wit: by shooting him in the back, against the form of the Statute in such case, made and provided and against the peace and dignity of the State."

The two charges were consolidated for trial.

THE STATE'S EVIDENCE

An unmarried female, Shirley Hollifield, spent Thursday, December 21, 1972, with the defendant and on that night spent the night with him at a motel. They were with another couple, and on Friday, December 22, 1972, they checked out of the motel about 11:00 a.m. and went to Weisner's Sandwich Shop where they spent the day in a booth drinking beer and wine. Shirley had previously dated John Seigler, and in fact, had had a child by Seigler. About 8:00 p.m., on December 22, 1972, Seigler entered the Sandwich Shop and sat on a stool at the bar near the front. Seigler had not been there but a short while when Shirley went to the front of the shop for the purpose of using the telephone. Upon seeing Seigler, she engaged in a short conversation with him and then, after using the telephone, returned to the booth and joined the defendant and the couple they had been with for some time. Having seen Shirley and Seigler engage in a conversation, the defendant then left the booth and went to the front where Seigler was and informed Seigler that Shirley was with him and was going to remain with him. The defendant then returned to the booth. After some several minutes, Seigler went to the back to use the rest room and on leaving the rest room stopped at the booth where Shirley and the defendant were sitting with the other couple, and at that time, Seigler made the remark that Shirley was old enough to know what she wanted and to go with whom she liked and that he, Seigler, was going home. Seigler started towards the door in the front, and at that time, the defendant stood up and called to him. Upon being called, Seigler turned to face the defendant, and the defendant began to fire with a .25 automatic. Seigler was struck in the right wrist and also in the abdomen. After being struck in the front, Seigler turned to leave and was then struck in the back. The defendant shot five times. Three bullets went in the front of Seigler and two in his back. Seigler was taken to the hospital in an unconscious condition and remained there 28 days.

State v. Dilldine

At the time of the shooting, Seigler was carrying a pistol. The defendant relied upon self-defense.

Attorney General Robert Morgan by Associate Attorney C. Diederich Heidgerd for the State.

Assistant Public Defender Richard S. Towers for the defendant appellant.

CAMPBELL, Judge.

The defendant assigns numerous exceptions to the judge's charge to the jury sufficient we think to merit a new trial. In view of this, we will not go into the factual situation in greater detail. The evidence was ample to go to the jury.

[1] At the outset, it should be noted that this was one offense and not two. It was improper to have two bills of indictment and two offenses growing out of this one episode. The mere fact that some of the shots entered from the front and some entered from the back does not make two offenses. It would be just as reasonable to have five offenses since there were five shots in all. Compare with *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974). Each bill of indictment in the instant case charged a felonious assault under G.S. 14-32(a) and as of the date of this offense carried a maximum imprisonment for not more than ten years.

[2] The first assignment of error pertains to the following portion of the charge:

"Now, members of the jury, we are trying two cases, really. Case No. 72-19256 is an assault with intent to kill, and Case No. 73-19742 is an assault with intent to kill inflicting serious injury not resulting in death. Both are felonious assaults."

The court then read the first bill of indictment to the jury and then charged:

"Now, the bill of indictment in the other case reads the same way except it is said 'by shooting him in the back, against the form of the statute in such case made and provided, and against the peace and dignity of the State.'"

The defendant asserts that these two instructions were inconsistent and confusing to the jury.

State v. Dilldine

Later in instructing the jury as to the elements of the crime and particularly with regard to the element of intent to kill, the court instructed:

"... So, intent to kill is the intent which exists in the mind of a person at the time he commits the assault or the criminal act, intentionally and without justification or excuse of his intent to kill his victim or *to inflict great bodily harm*, and such intent may be inferred from the nature of the assault, the manner in which the act was committed, the conduct of the parties and other relevant circumstances." (Emphasis added.)

The error assigned is to the use of the words "to inflict great bodily harm" as being sufficient to indicate an intent to kill and thus placing a lesser degree of proof upon the State than is necessary.

Another assignment of error is to this portion of the charge:

"Now, members of the jury, again, on this charge of an assault with a deadly weapon inflicting serious injury, if you are satisfied from the evidence beyond a reasonable doubt that Bill Dilldine on this 22nd day of December, 1972, intentionally shot this man Seigler without justification or excuse, and that he used this .25-caliber pistol, and that he thereby inflicted serious bodily injury to Seigler, and that he was not justified by self-defense, then it would be your duty to return a verdict of guilty as charged."

One of the elements of the crime with which the defendant was charged was assault with intent to kill. This instruction left that element out and yet would permit the jury to return a verdict of guilty as charged. Compare with *State v. Whitted*, 14 N.C. App. 62, 187 S.E. 2d 391 (1972).

Another exception to the charge was to this portion:

"The second case refers to the shots that Seigler received in his back. You will recognize that this is the more serious of the two charges."

Here, again, the trial judge treated the two cases as being of different seriousness, whereas, each charge was exactly the same as contained in the bill of indictment. There was no difference in the seriousness of the two cases.

Broughton v. Broughton

When all of these assignments of error are considered together, we think the defendant has been sufficiently prejudiced to warrant a new trial.

New trial.

Chief Judge BROCK and Judge HEDRICK concur.

ROBERT B. BROUGHTON v. CELESTE GOLD BROUGHTON

No. 7410DC392

(Filed 3 July 1974)

Husband and Wife § 12—property settlement decree—estoppel to assert invalidity—absence of consent

Plaintiff is estopped to challenge the validity of a property settlement decree on the ground that it was entered without defendant's consent where plaintiff immediately complied with the provisions of the settlement and defendant has accepted the benefits thereof; furthermore, defendant's lack of consent was not shown by defendant's institution of a suit after the decree was entered for personal injuries allegedly covered by the settlement decree, by defendant's failure to deliver personal property to plaintiff as ordered by the decree, or by defendant's interference with plaintiff's child visitation privileges.

APPEAL by plaintiff and defendant from *Winborne, District Court*, at the 24 October 1973 Session of WAKE County District Court.

Heard in the Court of Appeals 12 June 1974.

Plaintiff brought this action for divorce based upon a one-year separation. Defendant counterclaimed for alimony, custody of the minor children and child support. In four separate judgments or orders, all filed on 5 January 1973, Judge Winborne (1) by "Judgment" granted to plaintiff an absolute divorce; (2) by "Judgment of Permanent Alimony" the court found that plaintiff stipulated that defendant was entitled to permanent alimony and the court awarded the defendant permanent alimony in an amount to be fixed by the court; (3) by "Order of Custody and Visitation" awarded custody of the two minor children to defendant and granted to plaintiff visitation rights allowing the children to visit with him overnight two weekends per month and for two weeks each summer; (4) by "Order of

Broughton v. Broughton

Permanent Alimony" awarded to defendant permanent alimony and child support of fifteen hundred dollars (\$1,500.00) per month. This sum apparently breaks down as five hundred dollars (\$500.00) per month child support for each minor child and five hundred dollars (\$500.00) per month alimony. It was also ordered that plaintiff pay on behalf of the children, all medical and dental bills over three hundred dollars (\$300.00). In addition, the trial court ordered the plaintiff to reimburse the defendant for seventy-five hundred dollars (\$7,500.00) in debts and obligations she had paid and assumed since the separation of the parties. The trial court also awarded to the defendant her attorneys' fees and one of the family cars. Finally, as a property settlement and *not alimony*, the defendant was awarded the family home and ten thousand dollars (\$10,000.00). The "Order of Permanent Alimony" then read:

"The provisions of this order relating to the transfer of title to real property and to the designation of payments and transfer of property as being in the nature of property settlement, permanent alimony, and child support are entered with the consent and approval of the plaintiff made in open court."

Neither party appealed the judgments or orders of the trial court. The plaintiff immediately undertook compliance with the order including the payments and transfer of title to the residence. Plaintiff has now remarried.

On 17 May 1973, the defendant obtained a Show Cause Order directing the plaintiff to appear and show cause why he should not be held in contempt for failing to make the designated payments. Plaintiff then answered on several grounds and moved under Rule 60 of the North Carolina Rules of Civil Procedure to vacate the Judgment of Permanent Alimony and the Order of Permanent Alimony on the grounds that, (1) the Order and Judgment were entered through mistake, inadvertence and surprise in that the trial court entered the orders under the misapprehension that the defendant had consented to certain stipulations concerning the property settlement; and (2) that the Order and Judgment were void in that they were predicated on stipulations that were not consented to by the defendant. The defendant then moved to set aside the absolute divorce.

The trial court denied plaintiff's motion to set aside the Order of Permanent Alimony and held said order to be valid

Broughton v. Broughton

and binding on the parties. In denying the motion, the trial court found as a fact that the plaintiff had complied with the requirements of the Order, including transfer of title to the residence and his bi-weekly payments of seven hundred fifty dollars (\$750.00) until 1 June 1973. The trial court further found as a fact that the defendant, by her conduct, accepted the terms of the Order, including acceptance of the transfer of real property and the several payments for alimony, child support, and property settlement. The trial court then concluded that plaintiff and defendant, by their conduct, had accepted and consented to the provisions of the Order of Permanent Alimony and that they were therefore estopped to deny its validity. The trial court also denied defendant's motion to set aside the absolute divorce. Both parties appealed.

Emanuel and Thompson by Robert L. Emanuel for plaintiff appellant, appellee.

Vann & Vann by Arthur Vann and Arthur Vann III for defendant appellant, appellee.

CAMPBELL, Judge.

In this appeal defendant contends that the divorce decree and judgment and order of permanent alimony and child custody were validly entered and should be affirmed. Defendant's appeal is only to the point that should the Order and Judgment of Permanent Alimony be invalidated, then the decree of absolute divorce should also be overturned. We shall deal with this issue after considering plaintiff's appeal.

Plaintiff contends that the Order of Permanent Alimony, as it relates to property settlement, is void in that it was entered without defendant's consent and that therefore the trial court was without authority to act. Apparently, plaintiff contends that defendant's lack of consent is shown by the fact that some four months after the divorce the defendant filed suit for the recovery of damages for personal injuries allegedly sustained at the hands of the plaintiff during the marriage of the parties. Plaintiff contends that negotiations concerning the alleged personal injury took place before the divorce judgment and further that defendant's claim was covered by and cut off by the property settlement portions of the Judgment of Permanent Alimony. Plaintiff contends that defendant's lack of consent is further shown by the fact that certain items of the personal

Broughton v. Broughton

property of the plaintiff which were in defendant's possession at the time of the judgment and which were ordered to be delivered to plaintiff, have not been so delivered, and also by the fact that defendant has infringed upon plaintiff's visitation rights.

Property settlements may be merely approved by the court or may be merged into the decree as here and given decretal effect. Such a property settlement is valid and binding unless it can be shown that the decree was procured through fraud. See generally 27B C.J.S., Divorce, § 301(2), p. 408 (1959). Plaintiff has failed to show that the decree was obtained by fraud. The defendant does not contest the decree, and the trial court expressly found as a fact that the plaintiff consented. Plaintiff immediately complied with the provisions of the property settlement and defendant has accepted the benefits thereof. The plaintiff is bound by his stipulations, *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956), *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964), and is estopped to challenge the validity of the decree. See also *Noble v. Noble*, 18 N.C. App. 111, 196 S.E. 2d 62 (1973). Plaintiff has failed to show mistake or excusable neglect or that the judgment is void within the requirements of Rule 60 of the North Carolina Rules of Civil Procedure. Plaintiff's argument concerning the personal injury suit by the defendant is misplaced and would be raised more properly as a *res judicata* defense in the personal injury suit. The plaintiff's arguments concerning visitation and personal property would more properly be raised in a contempt proceeding. We find no error in the denial by the trial court of plaintiff's motion to set aside the Judgment of Permanent Alimony and the Order of Permanent Alimony. In light of this decision, we need not discuss defendant's appeal.

No error.

Judges PARKER and HEDRICK concur.

Insurance Co. v. Tire Co.

THE HOME INSURANCE COMPANY v. INGOLD TIRE COMPANY, INC.

No. 7414SC437

(Filed 3 July 1974)

1. Insurance § 135—fire insurance—security interest in chattels—subrogation

Where B-W Acceptance Corporation and defendant entered into an agreement to facilitate the financing of purchases by defendant of merchandise for inventory, B-WAC was to take a security interest in all chattels which it financed for defendant, and defendant agreed to hold the chattels at its risk and to carry insurance thereon, purchase of insurance by B-WAC with its own funds upon defendant's failure to provide insurance was solely for B-WAC's own protection, and plaintiff insurer upon paying B-WAC's loss, was subrogated to the rights of B-WAC against defendant.

2. Evidence § 29—subrogation receipt—no authentication or introduction

In an action to recover sums allegedly due plaintiff as a subrogee, the trial court erred in giving consideration to plaintiff's exhibit which purported to be a subrogation receipt, since the document was not properly authenticated or introduced.

3. Evidence § 29; Insurance § 135—fire insurance—sufficiency of evidence of loss

Where defendant and B-WAC entered into a financing agreement and B-WAC maintained records showing the items shipped to defendant, the amounts owed B-WAC on each item, and the date B-WAC received final payment on each item from defendant, the records standing alone were insufficient to prove the chattels that were destroyed in the fire in question and their reasonable value, since that method of proof failed to take into account that some of the property might have been sold for cash within a day or two prior to the fire and remittance not made to B-WAC, that some had been sold on installment terms, or even that defendant had wrongfully removed the property from the building prior to the fire.

Judge CAMPBELL dissenting.

APPEAL by defendant from *Clark, Judge*, 4 September 1973 Session of Superior Court held in DURHAM County.

In this civil action, plaintiff attempts to recover sums allegedly due it as a subrogee. Pertinent allegations of the complaint are summarized as follows:

On or about 4 August 1968, defendant entered into an agreement with B-W Acceptance Corporation (B-WAC) entitled "Finance Agreement and Power of Attorney to Expedite

Insurance Co. v. Tire Co.

Wholesale Financing." The primary purpose of the agreement was to facilitate the financing of purchases by defendant of merchandise for inventory. Under the terms of the agreement, B-WAC was to take a security interest in all chattels which it financed for defendant; defendant agreed to hold the chattels at its risk and to carry insurance thereon, with a loss payable clause in favor of B-WAC; and, if defendant failed to provide insurance, B-WAC was authorized to obtain insurance and charge defendant for the cost of same.

On various dates between 22 October 1968 and 6 March 1969, numerous chattels, including television sets, stereos, radios, etc., were shipped to and received by defendant at its place of business in Durham. Prior to each shipment the seller issued an invoice setting forth each item and the price; the invoices were delivered to B-WAC with copies to defendant. Thereupon, B-WAC, pursuant to its agreement with defendant and particularly the power of attorney contained therein, executed a promissory note and a financing statement covering each invoice and paid the seller for the chattels.

On or about 11 March 1969, defendant's building and contents were destroyed by fire. Destroyed in the fire were numerous chattels covered by defendant's agreement with B-WAC and the financing statements issued pursuant thereto. At the time of the fire, defendant had no insurance on the chattels insuring the same against the hazard of fire; that defendant had failed to comply with its agreement with B-WAC to carry insurance on said chattels.

Prior to 11 March 1969, B-WAC had taken out an insurance policy with plaintiff, which policy insured only the interest of B-WAC in merchandise in which it had an interest under a conditional sales agreement, trust receipt or other similar form of encumbrance; that said insurance was taken out by B-WAC at its own expense and without stipulations in favor of defendant or conditions of any kind imposing a duty on B-WAC to protect the property for the benefit of defendant; that defendant paid no part of the premiums for said insurance; that the policy covered all merchandise located within the continental United States and Canada in which B-WAC had an interest; that one of the conditions of said policy was that the insurance was to be considered as excess insurance and would not apply or contribute to the payment of any loss until the amount of any other insurance was exhausted.

Insurance Co. v. Tire Co.

Because of defendant's failure to provide insurance on the destroyed chattels in favor of B-WAC as agreed, plaintiff had paid B-WAC \$12,745.01 to cover B-WAC's loss. Pursuant to the subrogation clause of plaintiff's policy, plaintiff is subrogated to all rights and claims that B-WAC has against defendant. Plaintiff prayed judgment for the amount which it had paid B-WAC, together with interest, attorney fees and costs.

Defendant filed answer denying the material allegations of the complaint and specifically denied that it owes plaintiff anything.

Jury trial was waived and, following a trial, the court entered judgment making findings of fact and conclusions of law as contended by plaintiff and adjudged that plaintiff recover of defendant the sum of \$12,744.11, plus interest and costs. Defendant appealed.

Berry, Bledsoe & Hogewood, P.A., by Louis A. Bledsoe, Jr., and Yates W. Faison III for plaintiff appellee.

Edwards and Manson, by Daniel K. Edwards, for defendant appellant.

BRITT, Judge.

Defendant contends that plaintiff does not have a claim against defendant for the reason that defendant was, at least in effect, an insured under the policy issued by plaintiff. We disagree with this contention.

[1] In *Insurance Co. v. Assurance Co.*, 259 N.C. 485, 487, 131 S.E. 2d 36, 38 (1963), we find: "When a mortgagee purchases with his funds insurance solely for his protection, the insurer, upon payment of the mortgagee's loss as provided in the policy, is subrogated to the rights of the mortgagee against the mortgagor. *Bryan v. Ins. Co.*, 213 N.C. 391, 196 S.E. 345; *Batts v. Sullivan*, 182 N.C. 129, 108 S.E. 511; *Ins. Co. v. Reid*, 171 N.C. 513, 88 S.E. 779; 29A Am. Jur. 807; 46 C.J.S. 183. Where, however, the insurance is procured by the mortgagee pursuant to the authorization and at the expense of the mortgagor, no right of subrogation exists and the amount paid by the insurer must be applied to discharge or reduce mortgagor's obligation to mortgagee. (Citations.)"

The evidence in the instant case showed that the insurance in question was purchased by B-WAC with its funds solely for

Insurance Co. v. Tire Co.

its protection, therefore, we think the first rule above stated applies.

Defendant contends the court made numerous errors in the admission of evidence and in its findings of fact and conclusions of law. We think two of the contentions are sufficient to warrant vacating the judgment.

[2] The first of these relates to a document identified as plaintiff's Exhibit 6, purporting to be a "SUBROGATION RECEIPT," from B-WAC to plaintiff, acknowledging receipt of \$12,745.01, and subrogating to plaintiff all rights which B-WAC had against defendant resulting from the fire in question. This document was essential to plaintiff's case and although the record reveals that it was *identified*, the record fails to reveal that it was ever introduced. The record fails to disclose that the document was properly authenticated, therefore, we cannot assume that there was a mere omission in showing that the document was introduced.

Plaintiff argues that the order settling the case on appeal contains a finding that answers the contention in its favor. We disagree. The order provides: ". . . and the Court further finds as a fact that, in reaching the Court's Findings of Fact Nos. 20 and 22, the Court did consider Plaintiff's Exhibit 6, which is referred to in the attached Statement of Case on Appeal, as having been introduced in evidence." We cannot construe the quoted statement as a finding that Exhibit 6 *was* introduced into evidence.

[3] The second contention of defendant that has merit relates to the method employed by plaintiff to prove B-WAC's loss. We do not think the evidence was sufficient to support the court's findings as to the chattels in which B-WAC had a security interest and that were destroyed by fire.

Plaintiff's evidence tended to show: The seller of the chattels prepared an invoice showing that the chattels were sold to B-WAC in Greensboro and shipped to defendant in Durham. The invoice showed the items sold, the quantity, and the price of each item. B-WAC then prepared a "B-WAC WHOLESALE FLOOR PLAN" document on which was listed in one column the items set forth on the invoice; in an adjoining column headed "RELEASE AMOUNT" were listed the amounts which defendant owed B-WAC on each item; in another column headed "DATE OF RELEASE" an employee of B-WAC wrote in the date each

Insurance Co. v. Tire Co.

item was released from the instrument, that date being the date on which B-WAC received payment from defendant. At the bottom of each document was a promissory note covering the total cost of the items listed, plus charges; the note was signed on behalf of defendant by a representative of B-WAC pursuant to the power of attorney.

Over defendant's objections, plaintiff made out its claim by showing the items on each "B-WAC WHOLESALE FLOOR PLAN" sheet that had not been "released" by B-WAC, and the amount of the judgment is the sum total of those items. We perceive several fallacies in this procedure.

The burden was on plaintiff to prove its claim. Plaintiff's claim against defendant is no greater than its legal liability was to B-WAC. Plaintiff was liable to B-WAC for the reasonable value of merchandise in which B-WAC had a security interest and which was *destroyed in the fire*. Under defendant's agreement with B-WAC, defendant was authorized to sell the chattels in which B-WAC had a security interest in the regular course of defendant's "retail trade at their usual retail price for cash or on installment terms." B-WAC's office that served defendant was located in Greensboro. The method used by plaintiff in showing the chattels destroyed in the fire fails to take into account that some of the property might have been sold for cash within a day or two prior to the fire and remittance not made to B-WAC, that some had been sold on installment terms, or even that defendant had wrongfully removed the property, or a part of it, from the building prior to the fire.

We do not hold that the "B-WAC WHOLESALE FLOOR PLAN" documents were inadmissible in evidence, upon a proper showing that they were prepared, and that entries thereon were made, in the regular course of business. However, we do hold that the documents standing alone were insufficient to prove the chattels that were destroyed in the fire and their reasonable value.

For the reasons stated, the judgment is vacated, and, in the exercise of our discretion, we remand this cause to the superior court for a new trial.

New trial.

Chief Judge BROCK concurs.

Gaston v. Smith

Judge CAMPBELL dissenting:

I dissent for that the evidence did support the findings of fact by the Judge and those facts supported the conclusions of law. I would affirm the trial court.

JANICE GASTON, ELEANOR FRANKLIN JONES v. ALBERT JUDSON SMITH

No. 7421SC6

(Filed 3 July 1974)

1. Negligence § 6—*res ipsa loquitur*

The doctrine of *res ipsa loquitur* is applicable where the instrumentality which caused the damages was under the exclusive control of the defendant and the accident was such as does not ordinarily occur in the absence of negligence on the part of the defendant.

2. Negligence § 31; Fires § 3—negligence in causing fire—*res ipsa loquitur*

In an action to recover for damages from a fire which originated in defendant's apartment and spread to plaintiffs' apartment, the trial court erred in submitting the case to the jury under the doctrine of *res ipsa loquitur*, and the case should have been submitted on the question of actionable negligence, where plaintiffs' evidence tended to show that the fire was caused by the intoxicated defendant's cigarette when he fell asleep while watching television and negatived other causes by showing that no combustibles were stored in the area where the fire started and that the fire was not electrical in origin.

APPEAL by defendant from *Wood, Judge*, 27 March 1973 Session of FORSYTH County Superior Court.

The plaintiffs Janice Gaston (Gaston) and Eleanor Franklin Jones (Jones) rented an apartment from the defendant Albert Smith (Smith). Smith lived in the other side of the duplex apartment. A fire broke out in the late hours of 3 February 1971, in the apartment of the defendant Smith and spread to the apartment of the plaintiffs. Considerable damage was done to the plaintiffs' personal property as a result of the fire. The plaintiffs brought suit against the defendant for the damages sustained. From a judgment in favor of the plaintiffs, the defendant gave notice of appeal.

Gaston v. Smith

The plaintiffs' evidence tended to show that the defendant lived alone in his apartment and was alone there on the night that the fire occurred. The defendant stated that he often watched television and was in the habit of falling to sleep two or three nights a week while watching television in his apartment. On the night in question, he admitted that he had been drinking alcoholic beverages and had been smoking before the fire occurred. He further testified that he had fallen asleep in a chair in front of the television set. When he awoke, he found the room to be ablaze. The defendant suffered burns to his right foot, right hand, and scalp. A police officer, who arrived at the scene of the fire and talked to the defendant at the hospital, testified that the defendant was under the influence of alcohol at the time the officer talked with him. The nurse who admitted the defendant to the hospital also testified that he was intoxicated and that he was rude to the nurses upon his admission. A fire inspector talked with the defendant at the hospital to inquire about the causes of the fire. The defendant stated that he did not know what caused the fire, but it could have been caused by careless smoking.

Expert testimony introduced at the trial indicated that the fire started in a three or four square foot area to the right of the chair in which the defendant had been seated. The fire started at floor level and spread along the floor to the wall and spread up the wall. There was no showing of any combustible materials having been stored in the area where the fire started. Also, the expert testimony showed that the fire was not electrical in origin and was not caused by a television set located in the general area.

The defendant testified that he fell asleep in the chair on the night in question. He further testified that he had been smoking, but had extinguished his cigarette a few moments before he went to sleep. He stated that he got burned when he opened the door to allow fresh air to come into the room and the burning drape fell on him. The defendant denied being intoxicated at the hospital. He did not know how the fire started.

Jenkins, Lucas, Babb, and DeRamus, by Judson D. DeRamus, Jr., and R. Kenneth Babb for the plaintiffs-appellees.

Womble, Carlyle, Sandridge, and Rice by Allan R. Gitter for the defendant-appellant.

Gaston v. Smith

CARSON, Judge.

[1] The defendant assigns as error the submission of the facts to the jury with an instruction on the doctrine of *res ipsa loquitur*. This doctrine is applicable where the instrumentality which caused the damages was under the exclusive control of the defendant and it was such as does not ordinarily occur in the absence of negligence on the part of the defendant. *O'Quinn v. Southard*, 269 N.C. 385, 152 S.E. 2d 538 (1967); *Page v. Sloan*, 12 N.C. App. 433, 183 S.E. 2d 813 (1971). It is not necessary to show the precise negligent act of the defendant to invoke the doctrine of *res ipsa*. In fact, if the specific acts of negligence are relied upon, direct or circumstantial evidence is normally required rather than an inference. *Lea v. Light Co.*, 246 N.C. 287, 98 S.E. 2d 9 (1957); *Colclough v. A. & P. Tea Co.*, 2 N.C. App. 504, 163 S.E. 2d 418 (1968).

A thorough discussion of the doctrine of *res ipsa loquitur* is contained in the case of *Lane v. Dorney*, 252 N.C. 90, 113 S.E. 2d 33 (1960). This case concerned an automobile accident where a car in good mechanical condition ran off the road causing the injury. The traveled portion of the road was dry and paved. No other travelers were using the highway at the time and place of the accident. A tire mark was found leaving the paved surface of the road and leading to the wrecked vehicle. No other indications of tire marks were found. There was no evidence of a blow out, blinding lights, skidding, or other mechanical defects, or negligence on the part of another traveler. The Supreme Court held the doctrine of *res ipsa* to be inapplicable under those circumstances. It pointed out that many things other than the negligence of the operator can cause an automobile accident, and the fact of the accident is insufficient to give an inference of negligence. Rather, the court held that the evidence inferred that the defendant, in rounding the curve, failed to exercise due care, to maintain a proper lookout, and to keep his car under control, and that the case should have been submitted to the jury on the issue of actionable negligence.

[2] The facts in the instant case are analogous to those in the Lane case. The fire itself does not give rise to an inference of negligence. The plaintiffs, however, have gone further than the mere showing of the occurrence of the fire. Their evidence tended to show that the defendant was alone in his apartment at the time the fire broke out. He had been drinking, had been smoking, and had fallen asleep in front of the television set.

In re Bullard

The fire broke out on the floor beside his chair. He was intoxicated when he was taken to the hospital. It further negated other causes by showing that no combustibles were stored in the area and that the fire was not electrical in origin. As in the Lane case, the evidence presented by the plaintiff was sufficient to show that the specific cause of the injury was the careless smoking of the defendant. This circumstantial evidence was sufficient to submit to the jury the question of actionable negligence. *Kekelis v. Whittin Machine Works*, 273 N.C. 439, 160 S.E. 2d 320 (1968); *Wilkerson v. Clark*, 264 N.C. 439, 141 S.E. 2d 884 (1965). We hold, therefore, that the trial court committed error in submitting the case to the jury under the doctrine of *res ipsa*.

New trial.

Chief Judge BROCK and Judge MORRIS concur.

IN THE MATTER OF: CHARLES BULLARD, RICKY McMILLIAN AND
JAMES ALBERT McCROWRE, JUVENILES

No. 7412DC487

(Filed 3 July 1974)

1. Infants § 10—trial of 14 year old for felony — procedural statute — constitutionality

G.S. 7A-280 providing for the trial of a minor who has reached his fourteenth birthday is not a penal statute which either forbids or requires the doing of an act to constitute a criminal offense; rather, it is a procedural statute, and it is sufficiently explicit to meet constitutional requirements.

2. Criminal Law § 21; Infants § 10—14 year old charged with felony—preliminary hearing in district court — findings required

G.S. 7A-280, which provides that when a child who has reached his fourteenth birthday is alleged to have committed a felony the district court judge shall determine probable cause, does not require that the determination of probable cause be supported by detailed findings of fact.

3. Infants § 10—14 year old charged with felony — transfer to superior court

Since G.S. 7A-280 specifically provides that when a fourteen year old juvenile is charged with a felony the district court must determine whether his case should be transferred to the superior

In re Bullard

court, defendants' contention that the district court had no power to transfer their cases to the superior court since the petitions and summonses in the cases did not mention the possibility of a transfer is without merit.

4. Criminal Law § 26; Infants § 10—infant charged with felony—preliminary hearing in district court—trial in superior court—no double jeopardy

Where the district court held a preliminary hearing, determined that there was probable cause to believe the juveniles guilty, and transferred the cases to the superior court, the hearing in district court was not an adjudicatory or dispositional one, though the order issued by the district court so stated, and the juveniles would not be subjected to double jeopardy by being tried in superior court.

APPEAL by juveniles from *Dupree, Judge*, 11 and 18 January 1974 Sessions of District Court held in HOKE County.

Heard in Court of Appeals 29 May 1974.

Charles Bullard, Ricky McMillian and James Albert McCrowre are juveniles above the age of fourteen. Juvenile petitions were filed in the District Court of Hoke County charging them with kidnapping and assault with intent to commit rape. The cases were heard on 11 January 1974. At the hearing the State presented evidence tending to show the commission of the offenses charged and the court found probable cause with respect to Charles Bullard and Ricky McMillian and continued the hearing until January 18 for James Albert McCrowre. On 18 January 1974, probable cause was found against McCrowre. In each case the court signed what was designated as a "Juvenile Adjudication Order" reading in part as follows:

"2. That probably the felonies of kidnapping and assault with the intent to commit rape were committed as alleged in the petitions dated December 23, 1973 and that this child probably committed said offenses.

.
"IT IS THEREFORE ORDERED that the Court proceed with the dispositional part of the hearing."

Then the court entered in each case what was termed a "Juvenile Disposition Order" reading in pertinent part:

"IT IS THEREFORE ORDERED that this case be transferred to the Superior Court Division of the General Court of Justice of Hoke County, North Carolina for trial as in the case of an adult as provided for by G.S. 7A-280."

In re Bullard

All three juveniles appealed to this Court.

Attorney General Robert Morgan, by Assistant Attorney General Ann Reed, for the State.

Philip A. Diehl for juvenile appellants.

BALEY, Judge.

[1] The juveniles contend that the District Court's order transferring their cases to the Superior Court was erroneous for four reasons. First, they assert that G.S. 7A-280 is unconstitutional because of its vagueness. G.S. 7A-280 provides in pertinent part:

"Felony cases.—If a child who has reached his fourteenth birthday is alleged to have committed an offense which constitutes a felony, the judge shall conduct a preliminary hearing to determine probable cause after notice to the parties as provided by this article. Such hearing shall provide due process of law and fair treatment to the child, including the right to counsel, privately retained or at State expense if indigent.

"If the judge finds probable cause, he may proceed to hear the case under the procedures established by this article, or if the judge finds that the needs of the child or the best interest of the State will be served, the judge may transfer the case to the superior court division for trial as in the case of adults. The child's attorney shall have a right to examine any court or probation records considered by the court in exercising its discretion to transfer the case, and the order of transfer shall specify the reasons for transfer."

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *In re Burrus*, 275 N.C. 517, 531, 169 S.E. 2d 879, 888, *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528; *accord, Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Winters v. New York*, 333 U.S. 507 (1948). G.S. 7A-280, however, is not a penal statute "which either forbids or requires the doing of an act" to constitute a criminal offense. It is a procedural statute. G.S. 7A-280 does not place anyone in the position of being unable

In re Bullard

to determine whether his conduct is against the law. It is a statute which sets out a method of procedure and is sufficiently explicit to meet constitutional requirements.

[2] The juveniles next contend that when the District Court judge found probable cause to believe that they were guilty of the offenses alleged in the petitions, he should have been required to make detailed findings of fact explaining why he believed that probable cause existed. In support of this contention they cite *Kent v. United States*, 383 U.S. 541 (1966), in which the United States Supreme Court held that such findings of fact were required. However, the *Kent* opinion is applicable only to the District of Columbia, because it is based on a District of Columbia statute. The North Carolina statutes relating to juveniles do not require that a determination of probable cause be supported by detailed findings of fact. Such findings are not required in other preliminary hearings and, in the absence of specific statutory mandate, will not be judicially decreed in juvenile hearings.

[3] The juveniles' third contention is that the District Court had no power to transfer their cases to the Superior Court, since the petitions and summonses in these cases did not mention the possibility of a transfer. G.S. 7A-280 specifically provides that when a fourteen or fifteen-year-old juvenile is charged with a felony, the District Court must determine whether his case should be transferred to the Superior Court.

[4] Finally, the juveniles contend that they cannot be tried in Superior Court, since the District Court has already held an adjudicatory hearing and dispositional hearing in their cases. Under the constitutional prohibition against double jeopardy, a defendant may not be tried twice or punished twice for the same offense. *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569; *State v. Birkhead*, 256 N.C. 494, 124 S.E. 2d 838.

It is true that in each of these cases the District Court issued a purported "Juvenile Adjudication Order" and "Juvenile Disposition Order" which stated that an adjudicatory hearing and a dispositional hearing had been held. In reality, however, no adjudicatory or dispositional hearing was held. The District Court did not decide whether the juveniles were guilty of the offenses alleged in the petitions. It merely determined that there was *probable cause* to believe them guilty. Therefore, the hearing was not an adjudicatory hearing, although the court's

In re Bullard

orders incorrectly referred to it as such. Likewise, the court did not impose any punishment on the juveniles, although its orders incorrectly stated that a dispositional hearing had been conducted. Trial in the Superior Court is not a form of punishment. If the juveniles are found innocent in the Superior Court, they will not be punished at all. If they are found guilty in the Superior Court, they will receive such punishment as the court may impose under the law.

What the District Court actually did was to hold a preliminary hearing, determine whether there was probable cause to believe the juveniles guilty, and transfer the cases to the Superior Court. In substance, though not in form, the court complied with the requirements of G.S. 7A-280. Since there has been only a determination of probable cause, and not an adjudication of guilt, the juveniles have not yet been placed in jeopardy. See *State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12; *State v. Birkhead*, *supra*.

Under G.S. 7A-280, when a child of fourteen or fifteen is charged with a felony, the District Court must hold a *preliminary* hearing to determine whether there is probable cause to believe the child guilty. If the judge finds that probable cause exists, he must then decide whether to try the case himself or transfer it to the Superior Court. If he determines that the needs of the child or the best interest of the State will be served by a transfer, he may order the case transferred. If he decides to try the case himself, he must then hold an adjudicatory and dispositional hearing in accordance with the provisions of G.S. 7A-285 and 7A-286.

In these cases the court after a preliminary hearing under G.S. 7A-280 has found probable cause and has determined that the needs of the juveniles and the best interest of the State will be served by a transfer to the Superior Court for trial.

The transfer orders of the trial court are affirmed.

Affirmed.

Judges MORRIS and HEDRICK concur.

State v. Covington

STATE OF NORTH CAROLINA v. JIMMY DEXTER COVINGTON

No. 7414SC349

(Filed 3 July 1974)

1. Constitutional Law § 31—disclosure of identity of confidential informant

In a prosecution for possession, possession with intent to distribute, and manufacture of heroin, the trial court did not err in refusing to order disclosure of the identity of a confidential informant relied upon by the police in procuring a warrant to search defendant's apartment where defendant failed to present reasons for such disclosure other than the right to confront his accuser.

2. Searches and Seizures § 3—search warrant — confidential informant — sufficiency of affidavit

Affidavit based on information furnished a police officer by a confidential informant was sufficient to support the issuance of a warrant to search defendant's apartment for heroin where it described the premises, the defendant and the heroin contained within the premises, and stated that the informant had seen heroin in defendant's apartment and possession on the date the warrant was issued, that the informant had used heroin and could recognize it, and that the informant had furnished information in the past resulting in convictions on drug offenses.

3. Narcotics § 3—use of narcotics paraphernalia — police officer as expert witness

In a prosecution for possession, possession with intent to distribute and manufacture of heroin, the trial court did not err in allowing a police officer who had worked on the vice squad to testify as an expert witness concerning the use of narcotics paraphernalia and the cutting of heroin in the Durham area.

4. Narcotics § 3— possession and manufacture — hypodermic needle and syringe allegedly owned by another

In a prosecution for possession, possession with intent to distribute and manufacture of heroin, the trial court properly admitted a hypodermic needle and syringe found during a search of defendant's apartment but alleged by defendant to be owned and used by another person.

5. Criminal Law § 102—questions by district attorney — absence of prejudice

Defendant was not prejudiced by questions asked him on cross-examination by the district attorney which related to collateral matters and to which objections were sustained.

APPEAL by defendant from *Clark, Judge*, 1 October 1973 Session of Superior Court held in DURHAM County. Argued in the Court of Appeals on 28 May 1974.

State v. Covington

Defendant was tried pursuant to three separate bills of indictment charging him with the unlawful possession of heroin, unlawful possession of heroin with intent to distribute, and unlawful manufacture of heroin. The cases were consolidated for trial.

The State's evidence tends to show that on 14 August 1973, Durham police officers went to defendant's apartment in Durham to execute a search warrant for heroin. Defendant arrived at his apartment between midnight and 1:00 a.m., leaving his German Shepherd dog tied to the front door. Shortly thereafter, one Tommy Noell, his wife, and another female arrived at the apartment. At 2:00 a.m., the officers prepared to enter the apartment and apprehended the defendant who had left the apartment to check on the then-barking dog. Defendant was searched and two packets of white powder were found in the front pocket of his trousers.

Officer Robert Lee Ray then entered the apartment and found Tommy Noell sitting at a table on which there was a plastic bag containing 3-4 grams of marijuana, several two-inch squares of aluminum foil with a small amount of white powder in the center of each, a bottle cap "cooker", an unused needle and syringe, a measuring spoon, and a deck of playing cards. Testimony was given as to the significance of these items as narcotics paraphernalia. The white powder was determined by the SBI Laboratory to be heroin.

At the close of State's evidence, defendant moved for judgment as of nonsuit. The motion was denied.

The defendant testified that the narcotics found on his person were "planted" there by the arresting officer; that the heroin "cooker" was placed in defendant's apartment by the police; and that the raid was prompted by the insistence of the District Attorney, whom defendant alleged was his partner in a heroin-manufacturing operation.

From a verdict of guilty and judgments rendered thereon, defendant appealed to this Court.

Attorney General Morgan, by Assistant Attorney General Webb, for the State.

Everett, Everett & Creech, by James B. Craven III for the defendant.

State v. Covington

BROCK, Chief Judge.

[1] Defendant contends the trial court committed error in refusing to order disclosure of the identity of the confidential informant, who was relied upon by the police in procuring the search warrant for defendant's apartment. Defendant argues the informant's identity was an indispensable element in preparing his defense and that his constitutional right of confrontation with his accuser was abridged by this nondisclosure.

"A defendant is not necessarily entitled to elicit the name of an informer from the State's witnesses. (Citation omitted.) The Government's privilege against disclosure of an informant's identity is based on the public policy of 'the furtherance and protection of the public interest in effective law enforcement.' (Citation omitted.) However, the privilege must give way '[w]here the disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause . . . ' (Citation omitted.)" *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53.

Defendant has failed to present reasons for disclosure of the confidential informant's identity other than the right to confront his accuser. This right has been balanced against, and found subservient to, the public interest in protecting the flow of information regarding criminal activities in the community. Absent a showing of necessity for divulgence of the informant's identity, the trial court may properly refuse such requested disclosure. This assignment of error is overruled.

[2] Defendant contends the trial court committed error in sustaining the validity of the search warrant and admitting the evidence seized pursuant thereto.

The affidavit to obtain the search warrant was based upon information furnished by an informant to Officer F. R. Wiggins of the Durham Police Department. The affidavit described the premises, the defendant, and the heroin contained within the premises. The informant had seen heroin in defendant's apartment and in defendant's possession on 13 August 1973. The informant had used heroin in the past and could recognize it on sight. The informant had furnished information in the past resulting in arrests and convictions on drug offenses.

This information furnished by the informant describes with reasonable certainty the person and premises to be searched, and

State v. Covington

contraband for which a search is to be made. The affidavit goes further in showing instances of past reliability upon the informant. Inasmuch as the affidavit to procure the search warrant and the search warrant itself are not defective, the evidence seized pursuant to the search warrant was properly admitted into evidence. This assignment of error is overruled.

[3] Defendant contends the trial court committed error in allowing a police officer to testify as an expert witness concerning the use of narcotics paraphernalia and the cutting of heroin.

The testimony of the witness cited in defendant's exceptions is a description of the use of such narcotics paraphernalia in general in the drug trade or traffic in Durham, based upon the witness' personal knowledge and experience in working with the Vice Squad for a period of years. The trial court cautioned the jury during the witness' testimony that the jury was not to infer that the particular instruments found in defendant's apartment were used for the preparation of heroin for injection.

The ruling of the trial court in admitting the testimony of Officer Ray amounts to a finding by the court that the witness is qualified to testify concerning the use of narcotics paraphernalia and the cutting of heroin in the Durham area. This is knowledge peculiar to the witness and which would serve to acquaint the jury with the use of the paraphernalia, and would aid the jury in evaluating the evidence presented by the State. This assignment of error is overruled.

[4] Defendant contends the trial court committed error in admitting in evidence a hypodermic needle and syringe alleged by defendant to be owned and used by Tommy Noell, but found in defendant's apartment during the search.

The needle and syringe were part of the paraphernalia discovered by officers in the search of the apartment. Admissibility of evidence is governed by its relevance to the issue. The weight to be given the evidence is determined by the finder of facts. The needle and syringe were admissible as relevant evidence which, along with other narcotics paraphernalia, tended to show the intent of defendant to possess heroin with intent to distribute and intent to manufacture. This assignment of error is overruled.

[5] Defendant, in his final argument, contends the District Attorney made inflammatory and prejudicial remarks which prevented defendant from receiving a fair trial.

Boyce v. McMahan

A review of the record reveals that none of the questions contended by defendant to be prejudicial were addressed to the offenses with which defendant is presently charged. Although we may admit that some of the questions and the fashion in which they were asked were not in the best manner of detached cross-examination, each such question was objected to, and the trial court properly sustained each of these objections. However, all of these questions dealt with collateral matters and were not prejudicial to defendant's cause. Absent a showing of harmful or prejudicial error, this assignment of error is overruled.

In our opinion, defendant received a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

R. C. BOYCE v. L. RAY McMAHAN

No. 7418SC351

(Filed 3 July 1974)

Contracts § 3—document subject to more detailed agreement—no enforceable contract

A paper writing between an owner of land and a developer relating to residential development of the land which was expressly made subject to a "more detailed agreement at some specific date to be agreed to by the parties hereto" was intended by the parties to be only a preliminary statement of their objectives and was not an enforceable contract.

Judge VAUGHN dissents.

APPEAL by plaintiff from *Kivett, Judge*, 3 December 1973 Civil Session, Superior Court, GUILFORD County. Argued in the Court of Appeals 7 May 1974.

On 1 November 1972, plaintiff instituted this action, pursuant to G.S. 41-10, to have the purported adverse claim of defendant under a paper writing executed by plaintiff and defendant removed from plaintiff's title to some 171 acres of land adjacent to his home at Sedgfield, North Carolina, and asking

Boyce v. McMahan

that the Register of Deeds of Guilford County be directed to cancel the paper writing, a copy of which was attached to the complaint.

The paper writing which is the subject of this action is as follows:

"EXHIBIT A—AGREEMENT Deed Book 2569, Page 519

NORTH CAROLINA
GUILFORD COUNTY

Steve Lawing 164 S
Main Hipi

THIS AGREEMENT made this 15th day of December, 1971, by and between R. C. BOYCE, hereinafter referred to as OWNER, and L. RAY MCMAHAN, hereinafter referred to as DEVELOPER, both of Guilford County, North Carolina;

WHEREAS, OWNER owns approximately 170 acres, more or less, located in Sedgfield, North Carolina, said tract of land adjoining his residence at 3101 Alamance Road, Sedgfield, North Carolina; and

WHEREAS, OWNER is desirous of developing said land into residential lots or tracts for the purpose of sale; and

WHEREAS, DEVELOPER desires to develop said tract of land into residential lots or tracts for the purpose of sale; and

WHEREAS the OWNER AND DEVELOPER, in order to effectuate the same, desire to enter into a preliminary agreement setting out the main features as to the desires of both parties and to execute a more detailed agreement at a later date;

WITNESSETH:

FOR AND IN CONSIDERATION OF \$10.00 and other valuable considerations paid from one to the other, the receipt of which is hereby acknowledged, the parties agree as follows:

1. OWNER agrees that said land owned by him consisting of 170 acres, more or less, the same adjoining his home at 3101 Alamance Road, Sedgfield, North Carolina, shall be developed by DEVELOPER and sold as residential lots or tracts, and in order to effectuate the same OWNER agrees to convey and execute such written instruments so that DEVELOPER may proceed to make necessary arrangements to develop

Boyce v. McMahan

said tract of land by engaging and making arrangements for necessary engineering, surveys, and landscape plans, and any other matters necessary in the development of the tract of land into residential lots or tracts;

That prior to the same OWNER will convey to DEVELOPER or such persons or corporations as he designates, the said 170 acres, more or less, with the following understanding and agreement by both parties.

a) That when said lots or tracts are sold DEVELOPER will pay to OWNER the sum of \$3000.00 per acre, the said \$3000.00 per acre to be paid before any other costs of developing said land is paid.

b) DEVELOPER will engage the necessary engineering and landscaping personnel and proper zoning for said development and any other means necessary for furtherance of developing the said tract or land.

c) OWNER is to receive the said sum of \$3000.00 from DEVELOPER upon the sale of said lots or tracts; that after the payment of same and all costs such as engineering, landscaping fees, and all expenses in developing said land, OWNER and DEVELOPER will then share the balance of the proceeds in equal shares.

d) DEVELOPER will commence to develop said land immediately after the engineering and landscape plans, maps, and other necessary preliminary arrangements are consummated.

2. That the parties hereto agree to supplement this preliminary agreement by executing a more detailed agreement at some specific and subsequent date to be agreed to by the parties hereto.

WHEREFORE, the parties hereto have executed this agreement in duplicate this the 15th day of December, 1971.

R. C. BOYCE (SEAL)

L. RAY McMAHAN (SEAL)''

Defendant answered, denying the material allegations of the complaint and averring that the paper constituted a valid, enforceable contract, and as a counterclaim asked that the contract be declared valid and enforceable and asked for specific performance and a jury trial.

Boyce v. McMahan

Plaintiff moved for summary judgment on the ground that the paper writing did not constitute a contract, that the parties had admittedly entered into no further or additional agreement, and there was no genuine issue of material fact.

Defendant moved for summary judgment on the counterclaim on the ground that the paper writing was a valid and subsisting contract capable of supporting a decree of specific performance.

The motions for summary judgment were supported by affidavits and answers to interrogatories. The court denied plaintiff's motions for summary judgment and allowed defendant's motion ordering that plaintiff immediately convey the land to defendant but subject to conditions as follows: That when lots are sold, developer will pay owner \$3,000 per acre "the said \$3,000.00 per acre to be paid before any other costs of developing said land is paid"; that "developer will engage the necessary engineering and landscaping personnel and proper zoning for said development and any other means necessary for furtherance of developing the said tract or land"; that owner "is to receive \$3,000.00 from developer upon the sale of lots or tracts; that after the payment of same and all costs such as engineering, landscaping fees, and all expenses in developing said land, owner and developer will then share the balance of the proceeds in equal shares"; that "developer will commence to develop said land immediately after the engineering and landscaping plans, maps, and other necessary preliminary arrangements are consummated."

From the signing and entry of judgment, plaintiff appealed.

Smith, Moore, Smith, Schell and Hunter, by Beverly C. Moore and Richard A. Leippe, for plaintiff appellant.

Fisher and Fisher, by Louis J. Fisher, Jr., and Turner, Rollins and Rollins, by Thomas Turner, for defendant appellee.

MORRIS, Judge.

Plaintiff contends that the paper writing which is the subject of this action is merely an agreement to agree, and therefore unenforceable as a contract. We think there is merit to this position.

Boyce v. McMahan

“An offer to enter into a contract in the future must, to be binding, specify all the essential and material terms and leave nothing to be agreed upon as a result of future negotiations. (Citations omitted.)” *Young v. Sweet*, 266 N.C. 623, 625, 146 S.E. 2d 669 (1966).

“‘Unless an agreement to make a future contract is definite and certain upon the subjects to be embraced therein it is nugatory. Consequently, the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation. . . . Therefore, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.’ 1 Elliott on Contracts, sec. 175.” *Croom v. Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735 (1921).

A thorough reading of the above quoted paper writing makes it perfectly clear that the parties intended it to be a preliminary statement of their desires or objectives. It is certainly obvious that the paper writing is not sufficiently specific to be the basis for a decree of specific performance. Even if the parties had intended this document to be a final agreement, the document would not be enforceable, for the parties have expressly made it subject to a “more detailed agreement at some specific date to be agreed to by the parties hereto.” The paper writing was executed and made expressly subject to a future agreement—an agreement which could be vitiated by either party’s refusal to acquiesce in a proposed term. The paper writing before us is, therefore, unenforceable, and the order of the trial court awarding specific performance must be reversed and the cause remanded for the entry of an order granting plaintiff’s motion for summary judgment.

Reversed.

Judge CAMPBELL concurs.

Judge VAUGHN dissents.

Taylor v. City of Raleigh

JAMES F. TAYLOR, ANNE S. TAYLOR, JASPER W. DUNN III, LINDA L. DUNN, RICHARD R. PATTY, AND NELL H. PATTY, HUBERT O. WHITAKER AND THERESA G. WHITAKER, HERBERT J. DAVIS AND CAROLYN DAVIS v. THE CITY OF RALEIGH, NORTH CAROLINA: TOM BRADSHAW, JR., MAYOR AND MEMBERS OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA; AND CLARENCE E. LIGHTNER, JESSE O. SANDERSON, ROBERT W. SHOFFNER, ALTON L. STRICKLAND, MICHAEL BOYD AND ELIZABETH REID, MEMBERS OF THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA, AND W. E. MANGUM

No. 7410SC106

(Filed 3 July 1974)

1. Equity § 2—laches

Laches is the negligent omission for an unreasonable time to assert or enforce an equitable right.

2. Equity § 2; Municipal Corporations § 30—attack on rezoning ordinance — laches

Plaintiffs are barred by the doctrine of laches from attacking the validity of a rezoning ordinance more than two years after the ordinance was passed where many of the plaintiffs appeared at a public hearing to oppose the rezoning before the ordinance was passed and nothing indicates that plaintiffs were not aware of the ordinance when it was passed.

3. Municipal Corporations § 2—annexation ordinance — standing to challenge

Plaintiffs who do not own property in a noncontiguous area annexed by a city have no standing to challenge the validity of the ordinance annexing such area.

APPEAL from *Hobgood*, Judge, 13 August 1973 Session of WAKE County Superior Court.

On 21 December 1970, the City Council of Raleigh unanimously adopted zoning Ordinance No. (1970) 33-ZC-91. This ordinance rezoned approximately 39 acres located outside the corporate limits of Raleigh from an R-4 classification to an R-6 classification. The former classification does not allow multi-family housing, but the latter does.

On 6 January 1972, the defendant Mangum filed a petition with the City of Raleigh to annex approximately 39 acres under the authority of Chapter 989 of the 1967 Session Laws of North Carolina. This is the same land which had previously been

Taylor v. City of Raleigh

rezoned to the R-6 classification. After giving the required public notice and holding the required public hearings, on 20 March 1972, the City Council unanimously adopted Ordinance No. (1972) 211 providing for noncontiguous annexation of the 39 acre tract in question.

On 2 January 1973, the City Council adopted resolutions providing for the acquisition by condemnation of certain portions of the plaintiffs' land on which to construct a sewage line between the city limit of Raleigh and the noncontiguous 39 acres previously annexed. Special proceedings actions were subsequently instituted to condemn the needed property.

On 12 January 1973, the plaintiffs filed an action seeking to declare unconstitutional both the rezoning ordinance enacted in 1970 and the annexation ordinance enacted in 1972. In addition, the action sought to restrain the defendant City of Raleigh from condemning the land of the plaintiffs for the construction of the sewage line. Each party stipulated to the factual situation as outlined, and each party moved for summary judgment. Summary judgment was granted in favor of defendants, and plaintiffs gave notice of appeal.

Barringer and Howard by Thomas L. Barringer for plaintiffs-appellants.

Broxie J. Nelson, Fred P. Baggett, Ann S. Beddingfield and Clyde Holt III, attorneys for defendants-appellees, City of Raleigh, Mayor, and Members of the City Council.

Hatch, Little, Bunn, Jones and Few by David H. Permar for defendant-appellee, W. E. Mangum.

CARSON, Judge.

The plaintiffs do not contend that improper statutory procedures were implemented concerning the rezoning ordinance. Rather, they contend that the rezoning is spot zoning and contract zoning, both of which are disapproved in this jurisdiction. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972); *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E. 2d 325 (1968). Even if we are to assume that the plaintiffs are correct in their contentions that the rezoning was spot zoning and contract zoning, which we do not concede, the first question to be answered is whether the plaintiffs have standing to contest this action more than two years after the zoning ordinance was

Taylor v. City of Raleigh

enacted. While there is no specific statute of limitations regarding challenging the validity of zoning ordinances, G.S. 1-254 provides that a declaratory judgment is the proper method to determine its validity. Public hearings were held in 1970, before the property in question was rezoned. A number of plaintiffs in this matter appeared at the hearing in opposition to the change. There is nothing in the record to indicate that the plaintiffs were not fully aware that the rezoning ordinance was passed in 1970. Nor is there any reason to assume that they were unable to challenge the rezoning ordinance by seeking a declaratory judgment.

[1] The defendants maintain that the plaintiffs should be barred by laches in the absence of a specific statute of limitations. We think their contentions are well founded. The doctrine of laches is an equitable defense, which must be pled by the defendant in bar of the plaintiff's action. *Poultry Co. v. Oil Co.*, 272 N.C. 16, 157 S.E. 2d 693 (1967); *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938). It is applicable when the plaintiff can be shown to have lacked the diligence which may be expected of a reasonable and prudent man. *Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966); *Coppersmith v. Insurance Co.*, 222 N.C. 14, 21 S.E. 2d 838 (1942). It is the negligent omission for an unreasonable time to assert or enforce an equitable right. *Builders Supply Co. v. Gainey*, 282 N.C. 261, 193 S.E. 2d 449 (1972); *Stell v. Trust Co.*, 223 N.C. 550, 27 S.E. 2d 524 (1943).

[2] The rezoning ordinance in question here was enacted 21 December 1970. Public hearings were held prior to that time, and many of the plaintiffs appeared to oppose the rezoning of the property in question. The plaintiffs have not been diligent in asserting their rights, if any, in opposition to the zoning change; and we hold that they are barred by the doctrine of laches from asserting such rights at this time. *Marshall v. Hammock*, 195 N.C. 498, 142 S.E. 776 (1928); *Miller v. Marriner*, 187 N.C. 449, 121 S.E. 770 (1924).

[3] The record does not disclose that any one of the plaintiffs is a resident of either the City of Raleigh or the area annexed. The defendants' answer moves to dismiss on the grounds that the plaintiffs are not residents of either area. It is incumbent on the plaintiffs by their complaint to show that they have standing to raise the issue. Since the city is a political subdivision of the state, the general rule is that private citizens

State v. Plymouth

may not question its right to annex areas. 56 Am. Jur. 2d, Municipal Corporations, § 72. This rule has been modified in North Carolina by G.S. 160-453.18(a), now G.S. 160A-38(a), which allows persons owning property in the area to be annexed to appeal if such property owner believes that he will suffer material injury. While the city here was proceeding under Chapter 989 of the 1967 Session Laws, which does not set forth the persons who can appeal, rather than Chapter 160, we do not believe that this extends the right to challenge the annexation to persons outside the annexed area who do not own property within it. The trial court acted properly, therefore, in granting summary judgment against the plaintiffs.

In view of the application of the doctrine of laches in the rezoning ordinance and the lack of standing to sue in the annexation ordinance, we hold that the plaintiffs could not restrain the defendants from the condemnation for the sewer line in this action. Special proceedings for the condemnation have been instituted, and any defenses the plaintiffs may have may be asserted in those actions. We therefore find,

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. JIMMY RAY PLYMOUTH

No. 748SC295

(Filed 3 July 1974)

Automobiles § 113— involuntary manslaughter — head-on collision while passing

The State's evidence was insufficient for the jury in a prosecution for involuntary manslaughter arising from an automobile collision where it tended to show that defendant collided with an oncoming car while passing another vehicle, that a slight incline in the road created a blind spot which prevented defendant from seeing the oncoming car, and that there was no yellow line in defendant's lane of travel to warn him that oncoming traffic could not be seen, and where there was no evidence of drinking, excessive speed or reckless driving.

APPEAL by defendant from *Webb, Judge*, 12 November 1973 Session of LENOIR County Superior Court.

State v. Plymouth

The defendant was charged by two bills of indictment with the offense of involuntary manslaughter resulting from the operation of a motor vehicle. A plea of not guilty was entered in each case. A verdict of guilty as charged was returned in each case and from an active sentence of two to three years, the defendant gave notice of appeal.

There was very little conflict in evidence between that presented by the State and that presented by the defendant. The defendant was operating his automobile in a northerly direction on rural paved road 1578, two tenths of a mile north of the city limit of Kinston at approximately 9:30 p.m., on 5 February 1973. The highway in the area of the accident was straight, but there was a slight incline of about 15 to 20 degrees which created a blind spot in the road. There was a broken dividing line in the center of the road, but there was not a yellow line on either side of the dividing line. The road was 20 feet wide and the posted speed limit was 55 mph. The weather was clear at the time the collision took place.

There was no evidence of excessive speed, use of alcohol, or other aggravating factors. The evidence showed that the defendant was driving between 50 and 55 miles an hour when he overtook a car proceeding in the same direction. He sounded his horn, flicked his lights, and started to pass the other vehicle. As he was passing the other vehicle, he apparently saw the Volkswagen coming from the opposite direction. Both vehicles applied brakes but were unable to avoid the accident. The driver of the Volkswagen and his passenger were killed upon impact.

Attorney General Robert Morgan, by Assistant Attorney General Charles A. Lloyd, for the State.

Perry, Perry, and Perry, by Dan E. Perry for defendant-appellant.

CARSON, Judge.

The only question presented on appeal is whether the trial judge should have granted the defendant's motion for nonsuit duly made at the end of the State's evidence and again at the end of all the evidence. We think the position of the defendant is well taken. The instant case is very similar to the factual situation reported in *State v. Fuller*, 259 N.C. 111, 130 S.E. 2d 61 (1963). That case also involved a head-on collision which was

State v. Plymouth

not aggravated by the particular circumstances of the incident other than some evidence that the defendant may have been speeding slightly. While recognizing the difference between the want of due care which would hold one liable for damages in a civil action, and culpable negligence which would sustain a conviction of criminal laws, the court held that the factual situation in that case could not sustain a conviction of manslaughter. In reversing the defendant's conviction the court held at page 114 that:

[h]is failure to keep a proper lookout was the proximate cause of the collision. The evidence does not warrant a conclusion that defendant intentionally drove into the center lane with actual knowledge of the presence and position therein of the Tedder car. The unintentional violation of a prohibitory statute, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable foreseeability, is not such negligence as imports criminal responsibility. But if it is accompanied by recklessness or probable consequences of a dangerous nature, when tested by the foreseeability rule, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, then such negligence, if injury or death insues, is culpable.

We do not think that the facts of the instant case sustain a finding of culpable or criminal negligence. *State v. Massey*, 271 N.C. 555, 157 S.E. 2d 150 (1967); *State v. Reddish*, 269 N.C. 246, 152 S.E. 2d 89 (1967); *State v. Fuller*, *supra*; *State v. Ledford*, 10 N.C. App. 315, 178 S.E. 2d 235 (1971). There was no evidence of drinking, excessive speed, or reckless driving. Furthermore, there was not a yellow line in the defendant's lane of travel to warn him that oncoming traffic could not be seen. He sounded his horn and flicked his lights as he passed the other vehicle. The tragic consequences of the accident does not turn civil negligence into criminal negligence. The judgment of the trial court is reversed.

Judges BRITT and HEDRICK concur.

State v. Stalls

STATE OF NORTH CAROLINA v. TERRY LEE STALLS

No. 742SC328

(Filed 3 July 1974)

1. Criminal Law § 87—leading questions

The trial court did not abuse its discretion in allowing the solicitor to ask leading questions.

2. Criminal Law § 42—chain of custody of exhibits

The chain of custody of bags of vegetable matter allegedly taken from defendant's car was sufficiently shown by the State to permit their admission in evidence where the State presented evidence that the bags were taken from the car by one officer who handed them to another officer, the second officer identified the bags by a piece of paper on each bag containing a number, his initials and the date, the second officer delivered the bags to an SBI employee who gave them to an SBI chemist, the chemist analyzed the contents of the bags, resealed them and placed them in the trunk of his car where they remained until the trial, and the chemist identified the bags by his initials, the date and a file number he had placed on them.

3. Criminal Law § 89—prior inconsistent statement—witness not testifying before jury

A prior inconsistent statement allegedly made by a witness at the preliminary hearing was not admissible for any purpose where the witness only testified during a *voir dire* hearing and did not testify before the jury.

APPEAL by defendant from *Fountain, Judge*, 7 December 1973 Session of MARTIN County Superior Court.

The defendant was charged in a bill of indictment with the felony of possession of marijuana with intent to distribute in violation of G.S. 90-95. Prior to entering a plea, the defendant moved to suppress the evidence found by the arresting officer in the search of his automobile on 31 October 1973. A hearing was conducted by the court on the motion to suppress, and both the State and the defendant presented evidence. Williamston Police Chief John Swain testified that the defendant had been a suspected dealer in drugs for some time prior to his arrest on 31 October 1973. Having received a telephone call from a reliable informer that the defendant had drugs in his possession and was going to Price's Pool Room, Chief Swain and other officers went immediately to the pool room. They saw the defendant by his car and, thinking he was about to leave the scene, arrested him and searched the car. One hundred and seventy-eight grams

State v. Stalls

of marijuana were found in the car. Further details of the search are unnecessary since the defendant does not question its validity by this appeal.

The motion to suppress was denied and a jury was impaneled. From a verdict of guilty as charged and the imposition of a five year sentence thereon, the defendant gave notice of appeal.

Attorney General Robert Morgan, by Associate Attorney Kenneth B. Oettinger for the State.

LeRoy Scott for the defendant-appellant.

CARSON, Judge.

[1] The defendant contends that the trial court committed reversible error by allowing the solicitor to ask certain questions which the defendant contends were leading questions. It is well established in this jurisdiction that the allowance of leading questions is within the sound discretion of the trial judge and will not be reviewed on appeal in the absence of abuse of discretion. *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Clanton*, 278 N.C. 502, 180 S.E. 2d 5 (1971); *State v. Staten*, 271 N.C. 600, 157 S.E. 2d 225 (1967). Clearly, the trial court did not abuse its discretion, and this assignment of error is without merit.

[2] The defendant next contends that the trial court committed reversible error by allowing into evidence material objects which had not been properly identified. Even though defendant's brief does not contain any authority in support of his position, we have examined the chain of custody relating to the exhibits. Officer Fink of the Williamston Police Department testified that he found eight small plastic bags on the floor of the defendant's automobile and a ninth bag was found underneath the floor mat. All of the bags contained a green vegetable material. He handed the bags to Corporal Keel, who was present at the search. Corporal Keel testified that Officer Fink handed him the large plastic bag with the smaller bags inside. The ninth bag, which was found underneath the floor mat, was added to the eight bags and was also taken into custody by Corporal Keel. Corporal Keel testified that he made up a work request for the State Bureau of Investigation and personally took the items to the SBI laboratory in Raleigh and handed them to J. M. Disnukes, an employee of the SBI. He further

Wyatt v. Haywood

testified that he was able positively to identify the plastic bags at the trial because each bag had a number on a piece of paper on the bag which had his initials and the date. SBI chemist Neal Evans testified that he had received the exhibit from J. M. Disnukes. He further stated that he could identify the exhibit because he had placed his initials and the date and file number on them. After analyzing the contents of the bag, he resealed it and placed it in the trunk of his car. It remained there until he produced it in court during the trial. The chain of custody of the exhibits was clearly established, and this assignment of error is likewise without merit.

[3] Finally, the defendant contends that the trial court committed error in not allowing witnesses to testify as to a statement allegedly made by Police Chief John Swain at the preliminary hearing of this case. The alleged inconsistency concerned the amount of time which elapsed from the time the chief was notified by his confidential informer until the search took place. A prior inconsistent statement of the witness is admissible only to impeach his testimony and is not substantive evidence. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Neville*, 51 N.C. 423 (1859). Even if Chief Swain had made a prior inconsistent statement, it would not have been admitted as substantive evidence for the defendant. However, Chief Swain did not testify at the trial here. He testified only on the motion to suppress the evidence by the defendant, and the jury did not hear this testimony. Obviously, his prior statements were inadmissible for any purpose since he was not offered by the State or the defendant as a witness.

No error.

Judges BRITT and HEDRICK concur.

ADDIE FAYE LANGLEY WYATT, EXECUTRIX OF THE ESTATE OF THOMAS B. WYATT, DECEASED v. PAULINE BOWMAN HAYWOOD AND CHARLES FRANKLIN HAYWOOD

No. 7420SC308

(Filed 3 July 1974)

1. Death § 3—automobile accident—wrongful death—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a wrongful death action where it tended to show that plaintiff's testate's

Wyatt v. Haywood

vehicle was proceeding west in its proper lane of travel when it was struck by defendant's eastbound car while the latter was to the left of its center of the highway.

2. Trial § 10—no expression of opinion by trial judge

The trial court in a wrongful death action did not express an opinion on the case in its rulings or comments or in its questioning of plaintiff's witnesses.

3. Automobiles § 90—failure to stay in proper lane—excessive speed—instructions proper

Where the evidence would permit the jury to find (1) that, as defendant overtook a vehicle stopped in the highway, defendant drove to the left of the center of the highway at a time when the same was not clearly free of oncoming traffic, and (2) that defendant insufficiently reduced her speed in the face of the hazard caused by another vehicle being stopped in the highway and failed to reduce her speed so as to avoid injury to plaintiff's testate, the trial court properly instructed the jury with respect to G.S. 20-150(a) and G.S. 20-141(c).

4. Trial § 36—blackboard diagram not substantive evidence—instruction proper

The trial court's instruction to the jury that a blackboard diagram used by witnesses at the trial was not substantive evidence but was used only to illustrate the testimony of the witnesses was proper.

5. Trial § 36—wrongful death action—expression of opinion in instructions

The trial court in a wrongful death action did not err in instructing the jury that they should not consider the issue of damages at all unless they first answered the issue of negligence in plaintiff's favor and then at the conclusion of the charge instructing the jury that "you may retire to the jury room and write in your answers to the two questions," since that statement was not an expression of opinion by the judge that the second issue, damages, should be reached by the jury.

APPEAL by defendants from *McConnell, Judge*, 17 September 1973 Session of Superior Court held in ANSON County.

Plaintiff brought this wrongful death action after her testator, Thomas B. Wyatt, was killed in an automobile accident allegedly precipitated by defendants' negligence.

Plaintiff's evidence tended to show the following. Plaintiff's testate, Wyatt, was traveling west on Highway 109 in a Volkswagen automobile, and defendant Pauline Bowman Haywood was traveling east when the vehicles collided. Haywood was operating a Ford automobile owned by her husband, defendant

Wyatt v. Haywood

Charles Franklin Haywood. Just prior to the collision, Barbara Helms Hunsucker, after giving a left turn signal, had stopped in the eastbound lane to let three westbound cars pass before attempting to make a left turn. The approaching vehicles were all traveling at approximately the same speed and were each a car length or more apart. The Wyatt automobile was following the other two. When the approaching cars first came into view, they were rounding a curve another witness estimated to be several hundred feet away. When she slowed to a stop in preparation for the left turn, Hunsucker looked in the rear view mirror and did not see any cars approaching behind her. After the first westbound car had completely passed and as the second car was in the process of passing, Hunsucker heard tires and brakes squeal behind her. Hunsucker said she saw the Haywood vehicle behind her as it collided with the Wyatt car and that had she been sitting on the back end of her car she believed she could have "hit it with her foot." The Haywood vehicle was in the air when she saw it. Later she testified that when she saw the Haywood car it was not directly behind her but rather more to the left than to the right.

The police officer who investigated the accident stated that he found the Haywood vehicle lying upside down on the north side of the road with its front end pointed west. The Wyatt automobile which was heavily damaged on the left front was right side up on the north side of the road and was angled in a southeasterly direction. In describing the scene of the accident, the officer stated:

"I found skid marks leading, starting in the eastbound lane running in a straight line for 50 to 75 feet, then they veered into the left lane going into an easterly direction to this area of debris . . . They were in the eastbound lane 126 feet; they continued a distance of 15 feet to the point of the area of the debris . . . and then a distance of 10 feet. However, here the skid marks were broken and there was [sic] indentations into the ground, and the car was laying upside down 3 feet off the road, paved portion."

West from the area of debris, the road was straight for 600 to 700 feet, although it inclined slightly. Going east, it ran straight for "several hundred feet" before curving north. When the accident occurred the pavement was dry and the visibility good.

Wyatt v. Haywood

Prior to his death, Wyatt was 52 years old, was employed by the Employment Security Commission and earned approximately \$6,950.00 per year from that position. He also operated a laundromat and owned rental property. His next of kin were his wife, age 41 and daughter, age 9.

Defendants offered no evidence. The jury awarded plaintiff damages in the amount of \$320,000.00.

E. A. Hightower for plaintiff appellee.

Hedrick, McKnight, Parham, Helms, Kellam & Feerick by Philip R. Hedrick for defendant appellants.

VAUGHN, Judge.

[1] Defendants contend that the court erred in denying their timely motions for directed verdict and judgment notwithstanding the verdict. The evidence was clearly sufficient to warrant submission of the case to the jury and to support the verdict. The evidence was sufficient to permit the jury to find that the Wyatt vehicle was proceeding west in its proper lane of travel when it was struck by the eastbound Haywood car while the latter was to the left of its center of the highway. Defendants' motions were properly denied.

[2] Defendants also claim that "the Court made numerous rulings on objections timely made by the defendants, along with other comments on the evidence presented, which clearly indicated to the jury the Court's attitude toward the trial of the case, . . . " in violation of G.S. 1A-1, Rule 51 which prohibits expressions of opinion by the court. We have carefully reviewed the rulings and comments which form the basis for these assignments of error and have concluded that the court neither expressly nor implicitly indicated any opinion regarding the case. We have also determined that although the court frequently questioned plaintiff's witnesses, in so doing it was endeavoring to clarify the evidence and did not unduly or in a biased manner interfere with counsel's presentation of the case.

[3] Defendants contend the judge erred because he instructed the jury with respect to G.S. 20-150(a) and G.S. 20-141(c). Assignments of error based on these contentions are without merit. It is the duty of the trial judge to declare and explain the law arising on the evidence in the case. The evidence in this case would permit the jury to find that, as Haywood overtook

Wyatt v. Haywood

the Hunsucker vehicle, Haywood drove to the left of the center of the highway at a time when the same was not clearly free of oncoming traffic in violation of G.S. 20-150(a). The evidence would also permit the jury to find that Haywood insufficiently reduced her speed in the face of the hazard caused by the Hunsucker vehicle being stopped in the highway and failed to reduce her speed so as to avoid injury to Wyatt.

[4] Defendants also maintain the court erroneously instructed the jury "that the blackboard diagram which was used at the trial was allowed into evidence and should be considered by the jury for the purpose of illustrating the witness' testimony when in fact the diagram was never offered into evidence." Although the record does not disclose that the blackboard sketch was ever formally offered and accepted into evidence, it was prepared by the witnesses during trial and used by several witnesses to illustrate their testimony on both direct and cross-examination. Defendants raised no objection to this use of the diagram at trial. Without request by counsel, the court properly instructed the jury that the diagram was not substantive evidence and was used only to illustrate the testimony of the witness. There is no merit to the assignment of error.

[5] Issues as to Wyatt's death as a result of Haywood's negligence and damages were submitted to the jury. The jurors were instructed that if they answered the first issue "yes," they should go to the second issue and that if they answered the first issue "no," that would end the case. Later the jurors were told "as I have already instructed you, you will not consider damages at all unless you have decided to answer the first issue in favor of the plaintiff." At the conclusion of the charge, the judge told the jury, "you may retire to the jury room and write in your answers to the two questions." Defendants contend that the last statement was an expression of opinion by the judge and that the second issue should be reached and, therefore, that the first issue must be answered in plaintiff's favor. Counsel urges that this constituted a peremptory instruction on the first issue. When the charge is considered in its entirety, we see no likelihood that the jury could have possibly regarded the judge's instructions as suggesting that they should answer the first issue "yes," and we, therefore, overrule this assignment of error.

We have carefully reviewed defendants' other assignments of error and hold that no prejudicial error has been shown. It

Food Stores v. Jones, Comr. of Revenue

does not appear the court abused its discretion in denying defendants' motion for a new trial and in refusing to set aside the verdict as excessive.

No error.

Judges PARKER and CARSON concur.

RICHMOND FOOD STORES, INC. v. G. A. JONES, JR., COMMISSIONER
OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 7410SC391

(Filed 3 July 1974)

Taxation §§ 9, 31— soft drink tax— discrimination against nonresident distributors — burden on interstate commerce

Provisions of G.S. 105-113.56A in effect requiring nonresident distributors of bottled soft drinks to attach a taxpaid crown or stamp to each container while permitting resident distributors to pay soft drink taxes on a monthly basis and requiring a nonresident distributor to pay a tax of one cent on each bottle while requiring resident distributors to pay only one-half cent for each bottle on the first two million one hundred and sixty thousand bottles sold annually constitute a discriminatory and undue burden on interstate commerce in violation of Article I, § 8 of the U. S. Constitution.

APPEAL by defendant from *Hobgood, Judge*, 11 December 1973 Session of Superior Court held in WAKE County.

Plaintiff seeks to recover certain taxes which it had paid under protest, contending that their levy constituted a discriminatory and undue burden on interstate commerce in violation of Article I, Section 8 of the Constitution of the United States.

The taxes were collected under G.S. 105-113.45, which, among other things, levies a one cent tax on each bottled soft drink distributed in the State. Payment of the tax is required under G.S. 105-113.51 to be evidenced by the affixing of tax paid crowns or stamps.

Plaintiff is a nonresident distributor and does not have a commercial domicile in the State. Plaintiff distributes bottled soft drinks in this State.

Food Stores v. Jones, Comr. of Revenue

G.S. 105-113.56A, in pertinent part, is as follows:

“Alternate method of payment of tax.—Instead of paying the tax levied in this Article in the manner otherwise provided, any resident distributor or wholesale dealer, and any distributor or wholesale dealer having a commercial domicile in this State may pay the tax in the following manner, with respect to bottled soft drinks:

Beginning with sales made on and after October 1, 1969, of bottled soft drinks subject to the tax, sales reports shall be made to the Commissioner on or before the fifteenth day of each succeeding month, accompanied by payment of the tax due, determined as follows: For the first fifteen thousand gross of bottled soft drinks sold annually, seventy-two cents (72¢) per gross; for all in excess of fifteen thousand gross, one cent (1¢) per bottle. In addition, there shall be allowed a discount of eight percent (8%) of the said tax to be remitted.”

Plaintiff alleged that the higher tax rate thus placed on it, as a nonresident distributor without a commercial domicile within the State, is an undue and discriminatory burden upon interstate commerce.

Under G.S. 105-113.56A, resident distributors pay the tax due on a monthly report basis and are not required to affix crowns or stamps to the containers. As a nonresident, plaintiff is required to purchase and affix tax paid stamps or crowns to each soft drink container within twenty-four hours of its receipt into the State. Plaintiff alleged and offered evidence tending to show that this method was expensive, time consuming and otherwise burdensome.

The case was heard by the judge without a jury. In pertinent part, Judge Hobgood concluded and ordered as follows:

“That G.S. § 105-113.56A as applied to out-of-state distributors is violative of Article I, Section 8, Clause 3 (the Commerce Clause) of the United States Constitution in that it is an unreasonable burden on interstate commerce.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. In respect to G.S. § 105-113.56A the word ‘resident’ and the clause ‘and any distributor or wholesale dealer

Food Stores v. Jones, Comr. of Revenue

having a commercial domicile in this state' have caused the above statute to be violative of Article I, Section 8, Clause 3 of the Constitution of the United States; it is therefore declared that these words are null and void and are of no effect whatsoever.

2. The plaintiff be permitted to pay all taxes due on bottled soft drinks under the 'Soft Drink Tax Act' under the alternate method as provided in G.S. § 105-113.56A.

3. The plaintiff have and recover from the defendant the amount of \$6,764.06, that being the amount of taxes, penalty and interest paid by the plaintiff 'under protest' to the defendant since June 9, 1972."

Defendant appealed.

Blanchard, Tucker, Denson & Cline by Charles F. Blanchard and Charles A. Parlato for plaintiff appellee.

Attorney General Robert Morgan by George W. Boylan, Assistant Attorney General, for defendant appellant.

VAUGHN, Judge.

We limit our consideration to the Federal constitutional question decided at trial.

In Section 3 of Chapter 1075 of the Session Laws of 1969, the General Assembly enacted the "Soft Drink Tax Act." The Act was ratified on 27 June 1969. G.S. 105-113.45, a part of that Act, among other things, levies a soft drink excise tax at the rate of one cent on each bottled drink. G.S. 105-113.51, also part of the Act, requires that the payment of the tax be evidenced by the affixing of tax paid stamps or crowns to each container.

On 2 July 1969, the General Assembly ratified Senate Bill 886 (Chapter 1251 of the Session Laws of 1969) entitled "AN ACT TO PROVIDE AN ALTERNATE METHOD OF REMITTING TAXES UPON BOTTLED SOFT DRINKS AND TO PROVIDE FOR PAYMENT OF SUCH TAXES WITH RESPECT TO OCTOBER 1, 1969, INVENTORY." That Act is codified as G.S. 105-113.56A which we have, in pertinent part, set out in the statement of facts. In summary, the results of this Act are as follows:

(1) Resident distributors remit the taxes due monthly whereas nonresident distributors must physically attach a tax

Food Stores v. Jones, Comr. of Revenue

paid crown or stamp to each container. It is clear that the method of payment required of nonresident distributors is considerably more expensive and burdensome than the method allowed residents. We see no distinction in the relative status, position or class of plaintiff from resident distributors that can justify the difference in the method of paying the tax.

(2) Resident distributors pay a tax at the rate of one-half cent for each bottle on the first two million one hundred and sixty thousand bottles sold annually. Plaintiff, a nonresident distributor, must pay twice as much tax, one cent on each bottle, on the same volume. This rate differential is clearly arbitrary and discriminatory.

We do not reach the question of whether, under proper attack, G.S. 105-113.56A could fail in its entirety as an unconstitutional exemption from the Soft Drink Tax Act in favor of a special class, resident distributors.

We hold that G.S. 105-113.56A, as written and applied to this plaintiff, violates Article I, Section 8 of the Constitution of the United States. The express provision in G.S. 105-113.56A that the Act applies to any "resident" distributor or wholesale dealer and to any distributor or wholesale dealer "having a commercial domicile in this State" constitutes an implicit provision that it shall not apply to any "nonresident" distributor or wholesale dealer or to any distributor or wholesale dealer "not having a commercial domicile in this State." The implied exclusion of nonresident distributors from the act has the same effect as if were boldly stated in express terms and is equally noxious to the Constitution of the United States. It is void.

The judgment from which defendant appealed is affirmed.

Affirmed.

Judges PARKER and CARSON concur.

Hardy v. Edwards

JIM HOWARD HARDY AND WIFE, WINNIE B. HARDY, PETITIONERS v. VIOLA HARDY EDWARDS AND HUSBAND, RANDOLPH EDWARDS; JESSIE L. HARDY STANLEY, WIDOW; LUBIA M. HARDY, SINGLE; JOHNNY B. HARDY, SINGLE; WILLIE T. HARDY, SINGLE; EDDIE HARDY, JR. AND WIFE, BETTY HARDY; ANNIE M. HARDY EDWARDS AND HUSBAND, DENNIS EDWARDS; AND MARY RUTH HARDY, RESPONDENTS

No. 743SC440

(Filed 3 July 1974)

1. Deeds § 11—construction of deed

In construing a deed it is the duty of the court to ascertain the intent of the grantor as embodied in the entire instrument, and every part of the deed must be given effect if this can be done by any reasonable interpretation.

2. Deeds § 14—construction of deed—reservation of interest

A deed is construed to convey a one-ninth undivided fee simple interest in the remainder, after a life estate to the grantor's mother, to each of the eight remaining grantees and to reserve in the grantor the remaining one-ninth interest.

APPEAL by defendants from *Fountain, Judge*, 4 February 1974 Session of Superior Court held in CRAVEN County.

This is a partition proceeding in which plaintiff, Jim Howard Hardy, alleges he is owner of a one-ninth undivided interest and defendants allege they are sole owners of the property under a recorded deed from the plaintiff. The only question presented is the construction of the deed, which reads as follows:

"THIS DEED, made this 12th day of September, 1950, by Jim Howard Hardy of Craven County and state of North Carolina, of the first part, to Annie Hardy (Widow), the entire tract of land for and during the term of her natural life, with remainder, after her death, to Eddie Hardy, Jr.; Viola Hardy Edwards; Johnny S. Hardy; Mary Ruth Hardy; Jessie L. Hardy; Willie T. Hardy; Lubia M. Hardy, (minor) and Annie M. Hardy (minor) all of Craven County and state of North Carolina of the second part;

WITNESSETH:

That said party of the first part for and in consideration of——Natural Love and affection and the sum of One Dollar——to him paid by said parties of the second

Hardy v. Edwards

part, the receipt of which is hereby acknowledged, has bargained and sold, and by these presents does bargain, sell and convey to said parties of the second part, their heirs and assigns, a certain tract or parcel of land in Craven County, state of North Carolina, bounded as follows, viz:

A one-ninth interest and estate to each of the grantees herein named, hereby reserving a one-ninth interest to the said Jim Howard Hardy, subject to the life-estate herein reserved unto the said Annie Hardy (widow), the following land to-wit:

[There then follows a description of a tract of land containing 13.2 acres, more or less, in Craven County, N. C., referred to as 'being the same land described in the deed from Emily C. Warren to said Jim Howard Hardy, bearing date of October 30th, 1944, and recorded in the public records in office of Register of Deeds for said Craven County, in Book No. 382——folio 177.']

TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging to the said parties of the second part their heirs and assigns in fee simple, forever, subject to the life estate above mentioned.

And the said party of the first part for his heirs, executors and administrators, covenant with said parties of the second part, their heirs and assigns, that he is seized of said premises in fee, and has the right to convey the same in fee-simple; that the same are free and clear from all encumbrances, and that he will warrant and defend the said title to the same against the claims of all persons whomsoever.

IN TESTIMONY WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year above written.

s/ JIM HOWARD HARDY (SEAL)"

The case was transferred to the civil issue docket for trial in the Superior Court upon the issues raised in the pleadings. The parties stipulated that the life tenancy created by the deed

Hardy v. Edwards

was terminated by death of the life tenant in 1973, and agreed that the case might be heard by the court without a jury.

The trial court, being of the opinion that the grantor in the deed reserved in himself a 1/9th undivided interest in the real property therein described, adjudged that:

“[E]ach of the following persons named in said deed and being parties to this proceedings, namely, Jim Howard Hardy, Eddie Hardy, Jr., Viola Hardy Edwards, Johnny B. Hardy, Mary Ruth Hardy, Jessie L. Hardy, Willie T. Hardy, Lubia M. Hardy, and Annie M. Hardy is entitled to a 1/9th undivided interest in said real property, and that this action is returned to the Special Proceedings Docket for further proceedings before the clerk of this Court.”

From this judgment, defendants appealed.

E. Lamar Sledge for plaintiff appellees.

Robert G. Bowers for defendant appellants.

PARKER, Judge.

[1] In construing a deed it is the duty of the court to ascertain the intent of the grantor as embodied in the entire instrument, and every part of the deed must be given effect if this can be done by any reasonable interpretation. *Rouse v. Strickland*, 260 N.C. 491, 133 S.E. 2d 151. “Generally stated, the rule is that in order for the court to hold any part of a deed void for repugnancy, the rejected part must be irreconcilably conflicting with the granting, holding, and warranty clauses.” *Reynolds v. Sand Co.*, 263 N.C. 609, 139 S.E. 2d 888.

[2] Applying these well established principles of construction to the deed in the present case, we think it manifest that the grantor intended and did convey a one-ninth undivided fee simple interest in the remainder, after the life estate conveyed to his mother, Annie Hardy, to each of the eight remaining grantees, and that he effectively reserved to himself the remaining one-ninth interest. We find no such irreconcilable conflict in the several portions of the deed as appellants contend requires that we thwart the grantor’s clearly expressed intent. The granting clause, habendum, and warranty are consistent with conveyance of fee simple interests in the remainder, and it is clear that the quantum of interest conveyed to each of the

State v. Harris

grantees, other than the life tenant, is a one-ninth interest. *Oxendine v. Lewis*, 252 N.C. 669, 114 S.E. 2d 706, and cases cited by appellants do not require a different result.

The judgment appealed from is.

Affirmed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. DONALD HARRIS

No. 7410SC543

(Filed 3 July 1974)

1. Criminal Law § 145.1—condition of probation—construction

Condition of probation that defendant pay a fine of \$700 “as directed by the probation officer” did not give defendant the entire period of his probation to pay the \$700, and defendant breached such condition where he was directed by the probation officer to pay at least \$50 per month but had made no payment for a period of ten months.

2. Criminal Law § 145.1—probation condition—wilful failure to pay fine

There was sufficient evidence to support a finding that defendant's failure to comply with a probation condition that he pay \$50 a month on a fine was wilful where it showed that defendant had been employed at a number of jobs during the more than two and one-half years that his probation was in effect and that he failed to make any payment during a ten-month period before the revocation hearing.

APPEAL by defendant from *McLelland*, Judge, 7 January 1974 Session of Superior Court held in WAKE County.

Defendant in this criminal case appeals from orders revoking his probation upon a finding he had willfully violated conditions of his probation and revoking suspension of his prison sentence and placing the sentence into immediate effect.

On 26 May 1971, after appeal from convictions in the District Court, defendant, represented by counsel, pled guilty in the Superior Court to a charge of driving a motor vehicle on the public highways while under the influence of intoxicating

State v. Harris

liquor and to two charges of driving while his operator's license was permanently revoked. The three charges were consolidated for judgment and defendant was sentenced to prison for a term of four years and six months. The judgment provided, however, that this sentence be suspended for five years and defendant be placed on probation under the supervision of the North Carolina Probation Commission upon certain conditions, to which defendant gave consent. Included among the conditions of probation was a special condition that defendant pay a fine of \$700.00 "as directed by the probation officer."

On 9 January 1974 a hearing was held in Superior Court before Judge D. M. McLelland, at which defendant was present and represented by counsel, to determine whether defendant had willfully violated the terms and conditions of the probation judgment as reported by the State Probation Officer. At this hearing, defendant's counsel stipulated he still owed \$330.00 on his fine. Following the hearing, Judge McLelland entered an order in which he found as a fact that defendant had "wilfully violated the conditions of his probation in that he had failed to make \$50 a month payments on his Court indebtedness as directed and has made no payments since March, 1973 during which period he was able and had the means to make said payments." On this finding, the court ordered defendant's probation revoked and the sentence of four and one-half years theretofore imposed placed into immediate effect. On subsequent review of the file, Judge McLelland entered an order dated 15 February 1974 in which he found that the prison sentence of four years and six months exceeded the maximum permitted by law for the most serious charge to which defendant had pled guilty, and in accord with this finding, "ex mero motu, and by authority of the ruling in *State v. Seymour*, 265 N.C. 216 (1965)," ordered that the sentence imposed on 26 May 1971 be vacated, that in its place defendant be sentenced to prison for the term of two years suspended upon the same conditions as provided in the original judgment, and that the previous orders entered 9 January 1974 revoking probation and revoking suspension of sentence be amended to change the stated term of imprisonment from four and one-half years to two years. Defendant appealed.

State v. Harris

Attorney General Robert Morgan by Assistant Attorneys General William B. Ray and William W. Melvin for the State.

Arnold & Adams by Brenton D. Adams for defendant appellant.

PARKER, Judge.

In his brief appellant understandably raises no question as to that portion of Judge McLelland's order of 15 February 1974 in which the court, *ex mero motu*, reduced defendant's prison sentence to two years, which was the maximum sentence authorized by statute for the most serious of the offenses to which he had pled guilty. G.S. 20-28. Accordingly, on this appeal we express no opinion as to the procedure by which this correction in the sentence was accomplished.

[1] In his brief, appellant contends that "it was not a condition of the defendant's suspended sentence that he make monthly payments of \$50.00 per month, but rather that he pay \$700.00 during the term of his suspension under the direction of his probation officer," and he submits that he was complying with the terms of his suspended sentence "in that he had made more than half of his total payment during approximately half of the period of suspension." The probation judgment did not, however, as appellant now contends, direct that he pay the fine of \$700.00 "during the term of his suspension under the direction of his probation officer," but on the contrary, clearly directed that he pay the fine "as directed by the probation officer." Further, the record clearly discloses that defendant had been "advised repeatedly by this officer to make regular payments on his court indebtedness of not less than \$50.00 per month." A written report containing that statement was served on defendant on 3 October 1972, some fifteen months prior to the hearing at which his probation was revoked. There can be no question that defendant clearly understood the rate at which he was to pay his fine.

[2] Appellant's remaining contention, that there was insufficient evidence to support the court's finding that his violation of the terms of his probation was willful, is equally without merit. The evidence indicates that defendant had been employed at a number of jobs during the more than two and one-half years that his probation remained in effect and that he never-

State v. Vickers

theless failed to make any payment on his fine during the ten-month period preceding the revocation hearing.

The orders appealed from are

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JIMMIE MARSHALL VICKERS,
ALIAS JAMES LARRY CORWIN

No. 748SC527

(Filed 3 July 1974)

Larceny § 7—larceny after breaking and entering—articles not removed from premises

The State's evidence was sufficient for the jury in a prosecution for larceny after breaking and entering where it tended to show that a store had been broken and entered, that defendant was found inside the store, that tools belonging to the store had been taken from various locations in the store and commingled in the area of the store's safe with other tools brought there by defendant and his companion and that an electric saw belonging to the store had been placed near the exit door.

ON *certiorari* to review trial and judgment of *Martin*, (*Perry*) Judge, 18 January 1973 Session of WAYNE Superior Court.

Heard in the Court of Appeals 17 June 1974.

The defendant was tried on four bills of indictment containing five charges. The first bill charged him with felonious breaking and entering the premises of Sears Roebuck & Company on North Berkeley Boulevard in Goldsboro in the first count. In a second count the defendant was charged with felonious larceny after breaking and entering the Sears Roebuck & Company building. In another bill the defendant was charged with attempted safecracking. In a third bill he was charged with possession of offensive and dangerous weapons designed for use in burglary and other housebreaking. In a fourth bill he was charged with felonious possession without lawful excuse of implements of housebreaking. He was found not guilty by

State v. Vickers

the jury of attempted safecracking. He was found guilty by the jury on all the other charges, but the court sustained the defendant's motion to set aside the verdict in the case involving unlawful possession of dangerous offensive weapons and in the case involving the unlawful and felonious possession without lawful excuse of implements of housebreaking. The defendant was found guilty on the charge of breaking and entering and likewise on the charge of felonious larceny after breaking and entering and was given successive sentences of not less than nine nor more than ten years in the State's prison.

This Court granted a writ of certiorari to review the trial and judgment.

Attorney General Robert Morgan by Assistant Attorney General Parks H. Icenhour for the State.

Roland C. Braswell for defendant appellant.

CAMPBELL, Judge.

The State's evidence would support a finding of facts as follows:

Between 1:00 and 2:00 a.m. Sunday morning, 12 November 1972, the Goldsboro Police were alerted by a peculiar noise emanating through the burglar alarm system of the Sears Roebuck premises. The assistant manager of Sears Roebuck was called and met a police officer at the premises. Nothing unusual was observed on the outside of the premises. The assistant manager deactivated the alarm system from the outside entrance, and he and the police officer went inside. They then went to the area where the safe was located and which had a separate alarm system connected thereto. On arriving in the area of the safe they discovered the defendant and a companion in the vicinity of the safe. There was found in the vicinity a blue satchel-type bag and an olive drab Army napsack and two coats. Numerous tools such as wire cutters, small picks, jumper wires with alligator clips on them, bolt cutters, pry bars, screwdrivers, two skill saws, an electric hand saw and several electric extension cords were found in the area. Some of this equipment was not identified as belonging to Sears Roebuck, but other portions of it were identified as belonging to Sears Roebuck. The items that belonged to Sears Roebuck had been removed from the places where they ordinarily stayed in the building. The distance from where these articles were ordi-

State v. Vickers

narily kept varied from 50 feet to 200 feet. A hacksaw and hacksaw blades were identified as being property of Sears Roebuck and had been recently used. Chains and bolts on doors had been cut. On the roof of the building there was a penthouse with a hole torn in the side and two ladders were found on the roof next to the hole. The back doors of the building had been unfastened and the alarm system attached to those doors had jumper wires attached to the junction box which deactivated the alarm system. The defendant had an empty gun holster on his belt. Two loaded pistols were found under the safe. The safe had also been tampered with but had not been entered.

There was ample evidence of felonious breaking and entering. The defendant asserts that the evidence was insufficient to sustain the charge of larceny after breaking and entering for that nothing had actually been removed from the premises. We do not agree. Merchandise of Sears Roebuck had been commingled with the other tools brought there by the defendant and his companion, and one of the electric skill saws had been placed near the exit door. An intent to take these articles, when the defendant and his companion left, could be inferred.

The judge fully charged the jury on all the essential elements of larceny, including the element of asportation. In fact, no exception was taken to the charge.

The record in this case was nearly 100 pages in length, and over half of it was unnecessary to present the legal questions the defendant argued. The record in this case was printed at the expense of the taxpayers, as the defendant was an indigent. Much money could be saved if the attorneys would only bring forward a record sufficient to amply present the questions involved and not unnecessary portions of the trial. In this regard, the judge's charge containing more than 20 pages could have been eliminated since no exception was taken thereto.

We call attention to the following in the court's charge:

"Now, the law imposes upon the court at this time a responsibility that seems to be unnecessary in the minds of many people including myself. That is to review the facts. You have just heard the facts. You have just heard two fine lawyers argue the facts. . . ."

We wish to call attention to the fact that the law does not require the judge to review the facts and take up each wit-

Mewborn v. Haddock

ness that has testified one by one and repeat the testimony of the witness. The duty imposed upon the trial judge is to review only so much of the testimony as is necessary for him to apply the law. The statute G.S. 1-180 specifically provides:

“ . . . He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; . . . ”

In the instant case the defendant has had a trial free of prejudicial error, and we find no error.

No error.

Judges BRITT and PARKER concur.

MARVIN B. MEWBORN AND WIFE, MABEL P. MEWBORN; BILLY GENE PARAMORE AND WIFE, LINDA G. PARAMORE v. BRUCE E. HADDOCK

No. 743DC430

(Filed 3 July 1974)

Landlord and Tenant § 18—late payment of rent—acceptance by landlord as waiver of forfeiture

Where the parties entered into a lease agreement for a term of five years with the rent to be \$2600 per year payable on 2 January each year, failure of defendant tenant to make timely payment of the rent for the second year and acceptance by plaintiff landlord of the rent plus \$400 on 29 January did not create any new rental agreement; rather, acceptance by plaintiff landlord constituted a waiver of the forfeiture and was an affirmation by the landlord that the contract of lease was still in force.

APPEAL by plaintiffs from *Whedbee*, District Judge, 24 January 1974 Session, PITT County, District Court.

Heard in the Court of Appeals 19 June 1974.

This is a summary ejectment proceeding instituted 27 December 1973, by the Mewborns, as original landlords, against Haddock, the tenant, in a Magistrate Court. The magistrate entered a judgment dismissing the cause of action for failure on the part of the plaintiffs to prove their case. An appeal was taken to the district court where it was tried *de novo*.

Mewborn v. Haddock

In the district court certain facts were stipulated which may be summarized.

The Mewborns and Haddock entered into a lease agreement October 21, 1967, recorded March 1, 1973, in the Pitt County Public Registry.

The lease agreement provided for a term of five years commencing December 1, 1971, and expiring December 1, 1976, covering farm lands of 72 acres with certain crop allotments.

The rental was to be \$2,600 a year payable on the 2nd day of January each year.

Haddock paid the Mewborns the \$2,600 rental payment for the year commencing December 1, 1971, and ending December 1, 1972.

On 29 January 1973, Haddock paid the Mewborns the sum of \$3,000 as rental payment for the land for the year commencing December 1, 1972, and ending December 1, 1973.

The Mewborns gave notice to Haddock to vacate the premises more than 30 days prior to the 1st day of December 1973.

During the month of December 1973, Haddock mailed to the Mewborns by certified mail, "Deliver Only To Addressee, Return Receipt Requested," a check in the amount of \$2,600 in payment for the rental for the year commencing December 1, 1973, terminating December 1, 1974. The Mewborns refused receipt of said letter and check. Upon this refusal Haddock deposited \$2,600 with the Clerk of Superior Court of Pitt County for the use of the Mewborns, and this was done on or before 2 January 1974, for the purpose of complying with the provisions of the rental agreement.

The Mewborns have conveyed their interest in said land to the Paramores by deed dated January 5, 1974, and recorded in the Public Registry of Pitt County. The Paramores have been made parties-plaintiff.

Based upon the stipulations, the trial judge found certain facts and then concluded as a matter of law:

"That the issuing and accepting of the THREE THOUSAND DOLLARS (\$3,000) check for the agricultural year commencing December 1, 1972 did not constitute a variance of the contract dated October 21, 1967.

Mewborn v. Haddock

That plaintiffs, by acceptance of the rental on January 29, 1973 for the 1973 farm year with full knowledge that the rent was being paid late, and in a larger amount, relinquished and waived all right of forfeiture of the lease agreement of October 21, 1967 and restored it to its full force and original terms and the same is now in effect."

The plaintiffs excepted to those conclusion of law and appealed.

Frank M. Wooten, Jr., for plaintiff appellants.

James, Hite, Cavendish and Blount by Robert D. Rouse III for defendant appellee.

CAMPBELL, Judge.

Plaintiffs assert that the payment and acceptance of a larger sum of money, namely, \$3,000 instead of \$2,600, 27 days after the specified due date, as provided in the lease agreement, constituted a variance of the contractual agreement sufficient to create a new contract between the parties and was therefore a novation and created a tenancy from year to year terminable upon 30 days' notice prior to the expiration of the term.

For their position the plaintiffs rely upon the logic in *Coulter v. Finance Co.*, 266 N.C. 214, 146 S.E. 2d 97 (1966).

Coulter is clearly distinguishable from the instant case. In *Coulter* the lease was for three years with a monthly payment of \$175. The lease provided for an extension of two years with an increase of rent to \$225 per month and with a provision that in the event the two-year extension was desired, the tenant would notify the landlord 30 days prior to the termination of the original term. The tenant did not notify the landlord 30 days prior to the termination of the original term but did stay over and paid the increased rental payments of \$225 a month. It was held that the 30-day notice was for the benefit of the landlord; and when the tenant held over and continued to pay the increased rental payments, the landlord waived the notice requirement and the lease was extended for an additional two years.

In the instant case we are dealing with the original five-year term and with no holding over at all. The only thing that occurred in the instant case was that the tenant paid the an-

Norwood v. Works

nual rent 27 days late and paid \$400 more than the rental agreement called for. The landlord accepted the payment which was made late, and the tenant remained in possession. This did not create any new rental agreement, and the doctrine of novation is not applicable.

This case is controlled by what was said in *Enterprises, Inc. v. Pappas*, 19 N.C. App. 725, 200 S.E. 2d 205 (1973).

When the tenant Haddock failed to pay the \$2,600 rental payment for the agricultural year commencing December 1, 1972, on or before January 2, 1973, he was in breach of a condition of the lease; and the landlord Mewborn had the right to terminate the lease. The landlord Mewborn did not do so, however, and with full notice or knowledge of the breach for which a forfeiture might have been declared, accepted 27 days late the rental payment which not only amounted to \$2,600 but exceeded it and was in the amount of \$3,000. This constituted a waiver of the forfeiture and was an affirmation by the landlord that the contract of lease was still in force; and the landlord thereby became estopped from setting up a breach of any of the conditions of the lease prior thereto.

Affirmed.

Judges PARKER and HEDRICK concur.

LARRY R. NORWOOD v. COX ARMATURE WORKS

No. 743DC494

(Filed 3 July 1974)

Bailment § 3—car left for repairs—sufficiency of evidence of negligence of bailee

The evidence of plaintiff made out a *prima facie* case of negligence on the part of defendant where it tended to show that plaintiff delivered his vehicle to an agent of defendant for repairs on a Friday, that on the following Monday plaintiff telephoned defendant and was told that someone had picked up his car, and that plaintiff instituted a search for his car and found it wrecked, burned and lying in a junkyard; therefore, the trial court erred in directing verdict for defendant in plaintiff's action to recover the value of a mobile telephone unit which was in the car when it was delivered to defendant but which could not be recovered from the wrecked vehicle.

Norwood v. Works

APPEAL by plaintiff from *Whedbee*, District Judge, 23 January 1974 Session, PITT County, District Court.

Heard in the Court of Appeals 19 June 1974.

On Thursday, 1 February 1973, the plaintiff was the owner of a 1964 Oldsmobile automobile. Pursuant to a newspaper advertisement for the sale of this automobile, the plaintiff met Jackie C. Cox and received from Cox the sum of \$250 for the purchase of the automobile and at that time delivered the title to the automobile to Cox. The automobile itself, however, was not delivered to Cox, and the plaintiff retained possession of the automobile until such time as he could have removed therefrom a mobile telephone unit which was the property of Carolina Telephone and Telegraph Company and which the plaintiff had leased from the telephone company. Plaintiff retained the only set of keys to the automobile which was parked in a parking lot where it had been for some two or three weeks. The next day, Friday, 2 February 1973, the plaintiff arranged with the telephone company for the automobile to be brought to the telephone company for the purpose of removing the telephone unit. When plaintiff attempted to start the automobile, it would not start; and he contacted the defendant for the purpose of having the defendant tow the automobile to his place of business for the purpose of making the necessary repairs to start the vehicle. It was stipulated, "On February 2, 1973 Larry R. Norwood delivered a 1964 Oldsmobile, 4-door automobile bearing serial number 844LO41756 to James Gray, agent for Cox Armature Works." It was further stipulated, "The parties stipulate and agree that the reasonable fair market value of the mobile telephone unit installed in the 1964 Oldsmobile at the time of its delivery to the defendant was \$897.00."

The evidence on behalf of the plaintiff further reveals that in the late afternoon of Friday, February 2, 1973, plaintiff telephoned the defendant to ascertain if the automobile was ready. Plaintiff was advised over the telephone to hold on while a check was made. Plaintiff did hold on the telephone for some 15-20 minutes and no one returned, and so the plaintiff hung up the telephone and then went out of town. On the following Monday morning plaintiff again telephoned the defendant and again was told to hold on and did so for some 10-15 minutes and then hung up and redialed. On the second call plaintiff advised whoever answered the telephone of the difficulty he was having pertaining to getting his automobile. This person advised the

Norwood v. Works

plaintiff to hold on a minute and then returned and advised the plaintiff that someone had picked the automobile up. Plaintiff then instituted a search for the automobile and eventually located it in a junkyard in Wilson County. The automobile had been wrecked and burned and the plaintiff was unable to recover the telephone.

Percy R. Cox, the President of defendant corporation, testified:

“ . . . In this particular case I do not know to whom the car was delivered. I honestly don't know who got the car or what happened to the car now. . . . ”

Defendant had made repairs on the car by installing a new solenoid switch in the starter.

On 2 July 1973, defendant wrote to the plaintiff as follows:

“Dear Mr. Norwood,

On February 7, 1973 you had repair work on your car done at our business. We have not heard from you since that time. The amount owing us is \$30.15. We cannot understand why you have not payed this account. We try to be fair to our customers but I'm sure you will agree we have been more than fair with you.

If we do not hear from you within five days we will be forced to file a judgement [sic] against you.

Yours truly,

COX ARMATURE WORKS, INC.

s/ P. R. Cox

P. R. Cox

PRES.”

At the close of all the evidence, the defendant made a motion for a directed verdict. This motion was sustained and plaintiff's cause of action was dismissed. The plaintiff appealed.

Laurence S. Graham for plaintiff appellant.

Gaylord and Singleton by Mickey A. Herrin for defendant appellee.

State v. Walker

CAMPBELL, Judge.

The evidence, when taken in the light most favorable to the plaintiff, shows that the possession of the automobile in question by the defendant was that of bailee, under a bailment for the mutual benefit of the bailor and the bailee. The duty of the bailee under those circumstances is to exercise due care, and its liability depends "on the presence or absence of ordinary negligence." The evidence of the plaintiff made out a *prima facie* case, and it was error to sustain the motion of the defendant for a directed verdict and dismissal of the plaintiff's case.

This case is controlled by *Insurance Co. v. Motors, Inc.*, 240 N.C. 183, 81 S.E. 2d 416 (1954), where it is stated:

"A *prima facie* case of actionable negligence, requiring submission of the issue to the jury, is made when the bailor offers evidence tending to show that the property was delivered to the bailee; that the bailee accepted it and thereafter had possession and control of it; and that the bailee failed to return the property or returned it in a damaged condition. . . ."

Reversed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBERT EDWARD WALKER

No. 7426SC538

(Filed 3 July 1974)

1. Insurance § 112.5—fraudulent insurance claim—real injury

The filing of an insurance claim based on an accident admittedly staged with the intent to defraud the insurance company is a violation of G.S. 14-214, even if one who stages the accident is actually injured.

2. Criminal Law § 128—news broadcast—no prejudice to defendant—mistrial denied

The trial court did not abuse its discretion in denying defendant's motion for a mistrial on the ground of prejudicial news media publicity during the trial where defendant offered evidence that a radio station broadcast a news report to the effect that defendant had entered a plea of guilty in an insurance fraud case, but no member of the jury indicated that he had heard any such newscast.

State v. Walker

3. Criminal Law § 89—questioning of own witness by State—corroboration

The State may question its own witnesses about criminal convictions for the same incident and the same conduct with which defendant is charged, not for the purpose of discrediting them, but as corroborative evidence showing a common plan or scheme; therefore, the trial court did not err in allowing the solicitor to question several witnesses as to whether they had been convicted of making a fraudulent insurance claim growing out of the same accident involving defendant.

4. Insurance § 112.5—fraudulent insurance claim—policy not in evidence

In a prosecution for presenting a false and fraudulent insurance claim the trial court properly denied defendant's motion for nonsuit based on the State's failure to introduce into evidence the insurance policy under which the claim was made, since the testimony of the manager of the underwriting of insurance plans for the company in question and the insurance adjuster who handled the claim for the company was sufficient to indicate a contract of insurance.

ON *certiorari* to review the trial and judgment of *Ervin, Judge*, at the 1 October 1973 Session of MECKLENBURG Superior Court.

Heard in the Court of Appeals 13 June 1974.

The defendant, under G.S. 14-214, was charged with and convicted of feloniously and knowingly presenting a false and fraudulent insurance claim. The State's evidence tended to show that the defendant and several others staged an automobile accident between two cars by cutting the brake line on one car, a Buick, and having it run into another car, a Ford Thunderbird, from behind when the other car was stopped at a stop sign. The defendant was one of the occupants of the Thunderbird. The defendant filed a claim with Nationwide Mutual Insurance Company, together with a physician's statement for services rendered by one Dr. Emery L. Rann. Dr. Rann's bill was for \$185.00. Defendant's claim was settled for \$735.00 and the insurance company issued two drafts, one for \$550.00 payable to the defendant, and the other for \$185.00 payable to the defendant and Dr. Rann. From a verdict of guilty as charged and a sentence of not less than two nor more than five years in the State Prison, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Jerry J. Rutledge for the State.

Edmund A. Liles for defendant appellant.

State v. Walker

CAMPBELL, Judge.

[1] The defendant assigns as error the failure of the trial court to grant his motion for judgment as of nonsuit. The defendant argues that there was no evidence that he was not in fact injured in the automobile accident and no evidence that the doctor's report was false. Defendant argues that regardless of whether or not an accident is staged, that, if a person is actually injured by injecting too much realism into the act, any one of the cast of players could present a valid claim for insurance without violating G.S. 14-214. We do not agree. The record is replete with evidence as to the fraudulent staging of the accident. In the face of the other evidence, the credibility of the physician's report is at least suspect. We hold that the filing of an insurance claim based on an accident admittedly staged with the intent to defraud the insurance company is a violation of G.S. 14-214.

[2] Defendant also assigns as error the failure of the trial court to grant his motion for a mistrial on the grounds of prejudicial news media publicity during the trial. In the absence of the jury the defendant offered evidence that on the second day of the trial a local radio station broadcast a news report to the effect that defendant had entered a plea of guilty in an insurance fraud case. In regard to the newscast the trial judge asked the jurors if any of them had heard a radio newscast concerning the case. No member of the jury indicated that he had heard any such newscast. The trial court then denied defendant's motion. The allowance or denial of a motion for mistrial in criminal cases, less than capital, rests in the discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. 3 Strong, N. C. Index 2d, Criminal Law, § 128, p. 49 (1967). Defendant has failed to show any abuse of discretion and the assignment of error is overruled.

[3] Defendant further contends that it was error for the trial court to allow the solicitor, over defendant's objection, to question Betty Jean Cunningham, Mary Nell Reel, James Douglas and Lewis Miller as to whether they had been charged with making a fraudulent insurance claim growing out of the same accident involving defendant. Each of the witnesses admitted that they had been so charged and that they each had entered a plea of guilty at their trial. The defendant correctly contends that the State may not impeach its own witnesses. *State v. Horton*, 275 N.C. 651, 170 S.E. 2d 466 (1969), *cert. denied*, 398 U.S.

State v. Walker

959, 90 S.Ct. 2175, 26 L.Ed. 2d 545 (1970). However, it is quite permissible for the State to question its own witnesses about criminal convictions for the same incident and the same conduct with which defendant is charged, not for the purpose of discrediting them, but as corroborative evidence showing a common plan or scheme. See generally, Stansbury's North Carolina Evidence, § 92, p. 293 (Brandis Revision, 1973), and 2 Strong, N. C. Index 2d, § 34, p. 536 (1967), which we consider instructive even though not directly in point.

[4] Finally, defendant contends that it was error not to grant his motion for judgment as of nonsuit because the State, by failing to introduce into evidence the insurance policy, failed to prove that a contract of insurance existed which is required by G.S. 14-214. However, Mr. Jerry D. Daughtry, manager of the underwriting of insurance plans for Nationwide Mutual Insurance Company, testified for the State that his duties included the supervision and maintenance of the company records. Mr. Daughtry produced from his files the records of the company concerning "policy number 61-609-190". Testifying from these documents, Mr. Daughtry stated that Nationwide Mutual Insurance Company policy number 61-609-190 was in effect on the date of the accident with coverage for a 1960 Buick automobile owned by Blaine Robinson. Mr. Daughtry further testified that the policy jacket is mailed to the insured. A Mr. Paul Roy, apparently an insurance adjuster, testified that he handled defendant's claim under Nationwide Mutual Insurance Company policy number 61-609-190 for an accident allegedly occurring on 7 June 1972, and that he reached a settlement with defendant and paid the claim for seven hundred thirty-five dollars (\$735.00). Mr. Roy further identified the physician's report, the release signed by the defendant, and the endorsed drafts for the settlement which Mr. Roy had delivered to the defendant. Taking the evidence in the light most favorable to the State, we find no error in the denial, by the trial court, of defendant's motion for judgment as of nonsuit. The evidence was sufficient to indicate a contract of insurance.

We have reviewed defendant's other assignments of error and find them without merit.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

Lawson v. Walker

PATRICIA WEAVER LAWSON v. VICKIE PAULETTE WALKER AND
ROGER DALE WALKER

No. 7429SC464

(Filed 3 July 1974)

**Automobiles § 72—fall of baby from car seat—sudden emergency—
instructions**

In an action to recover for personal injuries sustained by plaintiff in an automobile accident, the trial court erred in its instructions by intimating that the fall of defendants' baby from the seat of the car caused a sudden emergency and that said emergency was not brought on by the negligence of the defendants.

APPEAL by plaintiff from *Webb, Special Judge*, at the 14 January 1974 Session of RUTHERFORD Superior Court.

Heard in the Court of Appeals 13 June 1974.

This is an action for damages for personal injuries sustained in an automobile accident allegedly caused by the negligence of defendants. The plaintiff, Patricia Weaver Lawson, was operating her automobile on Seitz Drive just outside Forest City, North Carolina, on 25 February 1972. She was traveling at approximately 20-25 miles per hour. As she came down a hill, she met an automobile operated by defendant Vickie Paulette Walker and owned by defendant Roger Dale Walker. The defendants' automobile swerved across the center line and collided with plaintiff's car causing the injuries complained of. The defendant testified that her fourteen-month-old baby fell from the car seat to the floor and that when she reached to grab her baby the automobile veered to the left and collided with plaintiff's automobile. From a jury verdict in favor of defendant, plaintiff appealed.

Hamrick and Hamrick by J. Nat Hamrick for plaintiff appellant.

Hamrick & Bowen by James M. Bowen for defendant appellees.

CAMPBELL, Judge.

The plaintiff assigns as error the following portion of the charge by the trial court:

"Now, in this case, the defendant contends that she was confronted with a sudden emergency. Now, I instruct

Lawson v. Walker

you that if a person through no negligence on her part is suddenly or unexpectedly confronted with peril arising from either the actual presence or the appearance of imminent danger to herself danger, to herself or to others is not required to use the same judgment that is required when there is more time to decide what to do. Her duty is to exercise only that care which a reasonably, careful and prudent person would exercise in the same situation. If at that moment her course and manner of action might have been followed by such a person under the same conditions, that she does all the law requires of her. Although in the light of after events it appears that some different action would have been better and safer. So the plaintiff's contention in this case which the defendant denies is that even though she might have not kept which would be ordinarily a reasonable lookout or kept her car under proper control or done her best to keep her car on the right-hand side of the road that she was confronted with sudden emergency and that her infant son caused some disturbance in the car. You will recall exactly the details of it, and that was sudden emergency. So that she could not be held quite as high a standard so far as staying on the right-hand side of the road and keeping her car under control or keeping a proper lookout. But I do want to instruct you there's no change in the law of negligence. The law as far as negligence is concerned says that a person is negligent if they do something that a reasonably, careful and prudent person would not have done or failed to do something which a reasonably, careful and prudent person would have done. And the 'Sudden Emergency Doctrine' just means what a reasonably, careful and prudent person would have done when confronted with a sudden emergency, as the defendant contends she was in this case. So I instruct you if you are satisfied by the greater weight of the evidence that the defendant was confronted with a sudden emergency, then, you would consider that as to whether she conducted herself as a reasonably, careful and prudent person would have done."

The plaintiff contends that under Rule 51 of North Carolina Rules of Civil Procedure the above charge is generally an insufficient explanation of the doctrine of sudden emergency and particularly an insufficient explanation of the requirement that defendant must not cause the alleged emergency by his own negligence. Rule 51 requires that the trial court in its charge

Parker v. Homes, Inc.

explain the law as it applies to the evidence of the case. The source or cause of the alleged sudden emergency is a vital issue in any consideration of the doctrine of sudden emergency. The trial court made only one reference, and that reference was parenthetical, to the requirement that the defendant, to be able to take advantage of the sudden emergency doctrine, must not bring on the emergency by his own negligence. The clear inference from the charge is that the trial court felt that the fall of the baby did in fact cause a sudden emergency and that said emergency was not brought on by the negligence of the defendants. It is the duty of the trial court in a case allegedly involving a sudden emergency to not only instruct that a lesser standard of care is applied in an emergency situation, but also the trial court must instruct that the jury must find that in fact a sudden emergency did exist and that the jury must further find that the emergency was in fact not brought on by the negligence of the defendants. The charge by the trial court was insufficient and we grant a new trial. *Rodgers v. Thompson*, 256 N.C. 265, 123 S.E. 2d 785 (1962). See also *Forga v. West*, 260 N.C. 182, 132 S.E. 2d 357 (1963); *Johnson v. Simmons*, 10 N.C. App. 113, 177 S.E. 2d 721 (1970); *cert. denied*, 277 N.C. 726, 178 S.E. 2d 832 (1971); *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593 (1947); Annotation, "Instructions On Sudden Emergency In Motor Vehicle Cases", 80 A.L.R. 2d 5 (1961).

New trial.

Chief Judge BROCK and Judge HEDRICK concur.

GLENNIE E. PARKER v. LIFE HOMES, INC., AND GORDON B. KELLEY AND UNIVERSITY REALTY CO., INC.

No. 7410SC496

(Filed 3 July 1974)

Corporations §§ 1, 28; Mortgages and Deeds of Trust § 40— purchase at foreclosure — corporation whose charter revoked — conveyance to innocent purchaser

A corporation's purchase of property at a foreclosure sale could not be set aside on the ground that the corporation's charter had been suspended for failure to file tax returns where the corporation conveyed the property to an innocent purchaser.

Parker v. Homes, Inc.

ON *certiorari* to review trial before *Hobgood, Judge*, 29 October 1973 Session of Superior Court held in WAKE County.

This is an action to set aside a trustee's deed. On 24 May 1968 plaintiff purchased a tract of land in Raleigh from Nita Freeman Hill and husband, Claude H. Hill. She made a note to the Hills for \$500.00 and executed a deed of trust to A. A. McMillan, Trustee, as security for the payment of the note. Subsequently, defendant Kelley was substituted as trustee in place of A. A. McMillan. Plaintiff defaulted in her payments on the note, and the deed of trust was foreclosed. Defendant Life Homes, Inc. purchased the property at the foreclosure sale, and on 23 August 1971, defendant Kelley, as substitute trustee, executed a trustee's deed conveying the property to Life Homes. Two days later Life Homes conveyed the property to defendant University Realty Company, Inc.

On 2 September 1969, prior to the foreclosure sale, the Secretary of State suspended the charter of Life Homes, Inc., for failure to file certain tax returns. The charter was not reinstated until 4 November 1971. No evidence was offered tending to show that when University Realty purchased the property from Life Homes, any of its agents or officers knew that Life Homes' charter had been suspended.

Plaintiff brought this action to set aside the trustee's deed conveying the property to Life Homes. The Superior Court entered judgment for defendants, and plaintiff appealed to this Court.

Earle R. Purser for plaintiff appellant.

Carl E. Gaddy, Jr., for defendant appellees.

BALEY, Judge.

G.S. 105-230 provides that when a corporation fails to file any tax return or pay any tax, the Secretary of State must suspend its charter for five years. When the corporation's charter is suspended, "all the powers, privileges and franchises conferred upon such corporation . . . shall cease and determine." Under G.S. 105-231, if a corporation exercises or attempts to exercise its powers after its charter is suspended, it may be held liable for a penalty of at least \$100.00 but not more than \$1,000.00. The individuals who exercise or attempt to exercise the corporation's powers may be fined a similar amount.

Parker v. Homes, Inc.

Plaintiff contends that since Life Homes' charter had been suspended, it had no power to purchase property at a foreclosure sale. Therefore, she argues, the trustee's deed to Life Homes was void, and she can still have the deed of trust canceled and obtain title to the property by paying off her \$500.00 debt.

The courts of North Carolina have held in a number of cases that a corporation whose charter has been suspended is not required "to remain completely dormant for five years." Robinson, N. C. Corp. Law, § 223, at 558. Such a corporation may bring an action in court. *Mica Industries v. Penland*, 249 N.C. 602, 107 S.E. 2d 120; *Swimming Pool Co. v. Country Club*, 11 N.C. App. 715, 182 S.E. 2d 273. It may defend an action brought against it. *Ionic Lodge v. Masons*, 232 N.C. 252, 59 S.E. 2d 829, *rev'd on rehearing on other grounds*, 232 N.C. 648, 62 S.E. 2d 73; *Trust Co. v. School for Boys*, 229 N.C. 738, 51 S.E. 2d 477. It may take property under a will. *Trust Co. v. School for Boys*, *supra*.

Page v. Miller and *Page v. Hynds*, 252 N.C. 23, 113 S.E. 2d 52, is a case that in many ways resembles the present case. In *Page* a corporation was the high bidder at a foreclosure sale. After the sale, but before the corporation paid for the property or received a trustee's deed, the Secretary of State suspended the corporation's charter. The corporation then assigned its bid to Henderson County. The Supreme Court stated that the assignment was effective and Henderson County was entitled to the property. At least when the rights of third parties are involved, the Court held that a corporation whose charter has been suspended has the *power* to assign a bid, regardless of whether the exercise of that power subjects the corporation to a penalty under G.S. 105-231. "The statute was not intended to deprive a corporation of its properties nor to penalize innocent parties." *Page v. Miller* and *Page v. Hynds*, *supra* at 26, 113 S.E. 2d at 55.

In the present case, likewise, Life Homes had the *power* to purchase plaintiff's property and sell it to University Realty. If transactions such as this were held entirely ineffective and void, then no one could safely purchase property from a corporation without first examining the public records to determine whether the corporation's charter had been suspended. Such a heavy burden should not be imposed upon innocent purchasers. Whether Life Homes and its officers are subject to penalties under G.S. 105-231, and whether the purchase by Life Homes

Morgan, Atty. General v. Power Co.

at the foreclosure sale could have been set aside if it had not subsequently conveyed the property to a third party, are questions that need not be decided on this appeal.

The trustee's deed to Life Homes, and Life Homes' deed to University Realty, were valid. University Realty is the owner of the property at issue in this case, and plaintiff no longer has any interest in it. The judgment of the Superior Court was correct and is affirmed.

Affirmed.

Judges MORRIS and HEDRICK concur.

ROBERT MORGAN, ATTORNEY GENERAL v. VIRGINIA ELECTRIC AND
POWER COMPANY AND STATE OF NORTH CAROLINA, EX REL,
UTILITIES COMMISSION

No. 7410UC509

(Filed 3 July 1974)

Utilities Commission § 9—interim rate increase—appeal dismissed

Order of the Utilities Commission allowing a power company to increase its rates by putting into effect a fossil fuel adjustment clause was interim in nature and not a final disposition of the case which was subject to appeal, since permission to implement the clause was made only on an interim basis until a full hearing could be held.

APPEAL by Robert Morgan, Attorney General of North Carolina, from orders of the North Carolina Utilities Commission dated 8 February 1974 and 12 March 1974.

Virginia Electric and Power Company (hereinafter referred to as Vepco) filed an application with the Utilities Commission on 29 January 1974, requesting permission to adjust and increase its electric rates and charges by putting into effect a fossil fuel adjustment clause (hereinafter referred to as a fuel clause).

On 8 February 1974 the Utilities Commission issued findings of fact, conclusions of law and an order, allowing Vepco to put the fuel clause into effect on and after February 9, de-

Morgan, Atty. General v. Power Co.

claring Vepco's application to be a general rate case, and scheduling a hearing on the application for 10 September 1974.

The Attorney General, on behalf of the using and consuming public, moved to postpone the effective date of the Commission's order pending judicial review. In the alternative, the Attorney General moved that Vepco be required to refund, with interest, any sums collected under the fuel clause in the event that the Commission, at its September hearing, found the clause to be unjustified. On 12 March 1974 the Commission denied the motion to postpone the effective date of the order, but granted the motion to provide for refund. The Attorney General appealed to this Court.

Attorney General Robert Morgan, by Assistant Attorney General I. Beverly Lake, Jr., and Associate Attorney Jerry J. Rutledge, for plaintiff appellant.

Robert C. Howison, Jr., and Hunton, Williams, Gay & Gibson, by Evans B. Brasfield, Guy T. Tripp III, and Allen C. Barringer, for defendant appellee Virginia Electric and Power Company.

Commission Attorney Edward B. Hipp, Assistant Commission Attorney Maurice W. Horne, and Associate Commission Attorney E. Gregory Stott, for defendant appellee North Carolina Utilities Commission.

BALEY, Judge.

Vepco and the Utilities Commission have filed motions to dismiss this appeal. They contend that the Commission's orders are interlocutory in nature and make no final decision which is subject to appeal.

The Commission's orders of February 8 and March 12 clearly indicate that Vepco was granted permission to implement its fuel clause only on an interim basis. A final determination as to whether this clause is appropriate will be made at the hearing on 10 September 1974. In its conclusions of law issued on February 8, the Commission stated (emphasis added) :

"[T]he Application for the addition of a fuel clause to the Company's tariffs should be set for public hearing on full evidence and testimony in accordance with the rules of procedure of the Commission for rate cases as hereinafter provided.

Morgan, Atty. General v. Power Co.

"The current disturbances in the coal market, resulting in large part from the energy crisis, the increasing prices of all forms of energy and VEPCO's present financial condition lead this Commission to the conclusion that VEPCO has shown good cause in writing to justify the allowance of the requested fossil fuel cost adjustment clause *pending full investigation and final decision in this docket*. . . . [T]he Commission is of the opinion that the fossil fuel clause should be allowed to become effective subject to the final disposition of this docket."

The Commission's order provides:

"1. That the Application of Virginia Electric and Power Company for authority to adjust its North Carolina retail electric rates and charges by the addition of a fossil fuel cost adjustment clause to its tariffs, be, and the same is, hereby set for investigation and hearing, and VEPCO shall have the burden of proof to show that the proposed change in rates and charges is just and reasonable as required by G.S. 62-75.

. . . .

"3. That the Hearing on the Application be set for two consecutive weeks, beginning on September 10, 1974 at 10:00 o'clock a.m. The matter will be heard in the Commission Hearing Room, Ruffin Building, One West Morgan Street, Raleigh, North Carolina."

Under G.S. 7A-29 only final orders of the Utilities Commission are appealable. Since we find the order in this case to be interim in nature and not a final disposition of the Vepco application, the motions of the Commission and Vepco to dismiss this appeal are granted.

Appeal dismissed.

Judges MORRIS and HEDRICK concur.

Lemons v. Lemons

EDITH OPAL LEMONS v. ROGER EDWIN LEMONS

No. 7415DC422

(Filed 3 July 1974)

1. Divorce and Alimony § 8—abandonment—sufficiency of evidence

Evidence which tended to show that plaintiff and defendant agreed on a separation after which defendant moved out of the trailer home leaving plaintiff in possession was insufficient to require submission of the issue of abandonment to the jury in this action for divorce from bed and board, alimony and attorney fees.

2. Divorce and Alimony § 18—alimony—wife as dependent spouse—insufficiency of evidence

Evidence was insufficient to show that plaintiff wife was the dependent spouse where it tended to show that she had worked during the entire marriage, that she was earning more money than defendant at the time of the separation, and that her income exceeded her reasonable expenses.

APPEAL by defendant from *Allen, Judge*, 24 October 1973 Session of District Court held in ALAMANCE County.

Plaintiff wife instituted this action seeking a divorce from bed and board, alimony, and attorney fees. In her complaint she alleges that she and defendant were married on 2 October 1970 and were separated on 6 May 1973. There were no children of the marriage. Plaintiff's cause of action is based upon alleged misconduct of the defendant as supporting spouse which she asserts constituted (1) such indignities to her person as to render her condition intolerable and life burdensome and (2) abandonment.

Defendant denied the allegations of the complaint, including the allegation that he was the supporting spouse, and set up a further defense alleging that the conduct of plaintiff was responsible for the separation.

The jury answered issues in favor of the plaintiff and judgment was entered granting the plaintiff divorce from bed and board and awarding alimony.

Defendant has appealed to this Court.

Clark, Tanner & Williams, by Eugene S. Tanner, Jr., for plaintiff appellee.

David I. Smith for defendant appellant.

Lemons v. Lemons

BALEY, Judge.

Defendant assigns as error the refusal of the court to grant his motion for a directed verdict. In our view the evidence when viewed in its most favorable light for the plaintiff was not sufficient for submission to the jury, and defendant's motion for a directed verdict should have been granted.

[1] No useful purpose is served by recounting details of the marital difficulties of plaintiff and defendant and endeavoring to assess fault. Suffice to say, plaintiff's own testimony shows that before the separation she and the defendant discussed such separation and agreed that it would be best if they separated. As a consequence of this agreement, defendant moved out of the trailer home leaving plaintiff in possession.

There is no abandonment when the separation is by mutual agreement. *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E. 2d 387.

[2] Then, too, the evidence was not sufficient to show that plaintiff was a dependent spouse. A dependent spouse is defined in G.S. 50-16.1(3) as "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse."

During the entire marriage plaintiff had worked at Western Electric and was earning more money than defendant at the time of the separation. Her income exceeded her reasonable expenses. There was no showing of a substantial need for support from defendant or to maintain her accustomed station in life. She was in no sense a dependent spouse within the meaning of G.S. 50-16.1(3).

Alimony is not awarded as a punishment for a broken marriage, but for demonstrated need. Under G.S. 50-16.2 it can be awarded only to a dependent spouse.

For the reasons stated, the judgment of the trial court is reversed.

Reversed.

Judges MORRIS and HEDRICK concur.

State v. Littlejohn

STATE OF NORTH CAROLINA v. ELMER REED LITTLEJOHN

No. 7429SC320

(Filed 3 July 1974)

Assault and Battery § 14— assault on officer — defendant as perpetrator — sufficiency of evidence

In a prosecution for assaulting an officer with a deadly weapon while the officer was in the performance of his public duties, the State's evidence was sufficient to permit a jury finding that defendant was the perpetrator of the crime where it tended to show that officers went to defendant's home to serve a warrant on defendant, defendant was observed "peeping" out the window, when officers entered the house defendant, whose voice the officers recognized, warned them he would use force against them if they continued, immediately thereafter a shotgun appeared from behind a curtain and was discharged, the party behind the curtain and the officers exchanged gunfire, and defendant was later treated for a gunshot wound.

ON *Certiorari* to review the trial of defendant before *Winner, Judge*, 5 March 1973 Session of Superior Court held in RUTHERFORD County. Heard in the Court of Appeals 9 April 1974.

This is a criminal action wherein the defendant, Elmer Reed Littlejohn, was charged in a bill of indictment, proper in form, with assaulting Forest Thompson, a law enforcement officer for the town of Spindale, N. C., with a deadly weapon, to wit: a 12 gauge shotgun, while Thompson was in the performance of his public duties.

Upon arraignment the defendant entered a plea of not guilty and a jury returned a verdict of guilty as charged. From a judgment that the defendant be confined in the North Carolina Department of Corrections for a period of not less than three (3) nor more than five (5) years (with a recommendation that defendant be placed on the Work Release Program), the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Charles J. Murray for the State.

Charles V. Bell for defendant appellant.

HEDRICK, Judge.

Defendant, by this appeal, presents but one question for our consideration: Did the trial judge err in denying defendant's

State v. Littlejohn

motion for judgment as of nonsuit and in submitting the case to the jury? Determination of this issue must be governed by the well-established rule that in passing on a motion for judgment as of nonsuit, the court must consider the evidence in the light most favorable to the State, and in so doing, must consider every reasonable inference arising from the evidence favorable to the State. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). The evidence offered by the State tends to establish the following:

On 29 November 1972 Officer Forest Thompson, a police officer of the town of Spindale, attempted to serve a warrant on the defendant. The officer knocked on the door of defendant's house and called for the defendant "to come on out"; however, the officer received no answer. After walking next door and ascertaining from defendant's wife that the defendant was inside his house, the officer returned to defendant's home and at that time observed the defendant "peeping" out the window. Thereafter, Officer Thompson, who had known the defendant for many years, entered the house and in so doing was accompanied by three other officers. The events which next transpired were disclosed in the following testimony of Officer Thompson:

"[J]ust as I entered his room . . . Elmer hollered . . . 'who in the hell is it?' And I told him who I was, 'I'm Forest Thompson of the Spindale Police Department. I said, come on out, I have got a warrant for you, or I'm coming in after you.' He says, 'the first s.o.b. to stick his head behind this curtain is through.' So I kept talking to him, telling him to come on out. He told me to 'get the hell out of his house' said, 'nobody invited you in here in the first place.' I told him that I had business in there; that I had a warrant for him. . . . * * * And then I heard a commotion going on back there, still, I don't see him at this time as I was talking to him. So then I heard foot prints coming toward me. I stepped over to the side of the curtain. The house was completely dark inside except my flashlight. * * * [T]hen all of a sudden a barrel of a gun come about that (indicating) far out.

* * * Elmer shot at me. * * * I hit the floor and started shooting at him. I heard the shotgun fired three times. I emptied my pistol at him."

After this exchange of gunfire, the officers fled defendant's house and called for more assistance. One of the officers fired

State v. Littlejohn

a tear gas bomb into defendant's residence and after a brief interval the police rushed the house, only to find that the defendant had escaped. The officers did discover a trail of blood, and further evidence offered by the State tended to establish that defendant later received medical treatment at a hospital for a wound. The foregoing events occurred on a Wednesday and the defendant was apprehended the following Saturday.

Defendant, although conceding that the evidence introduced by the State was sufficient to give rise to a reasonable inference that the defendant was in the house, contends that this same evidence was not sufficient to give rise to a reasonable inference that the defendant was the one who did the shooting. Defendant submits that the evidence presented was, at most, sufficient only to raise a suspicion or conjecture in regard to the identity of the defendant as the perpetrator of the crime, and thus, his motion for nonsuit should have been allowed. Defendant cites *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967) and *State v. Guffey*, 252 N.C. 60, 112 S.E. 2d 734 (1960) as support for this argument.

While we do not disagree with the principle that if the State's evidence is sufficient only to give rise to a conjecture or suspicion that defendant was the perpetrator of a crime, then a nonsuit must be granted, we are of the view that this states only half of the apposite rule. The other part of the rule states: If there is any evidence tending to prove the fact in question or which reasonably leads to its conclusion as a fairly logical and legitimate deduction, then the case should be submitted to the jury. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956); *State v. Simmons*, 240 N.C. 780, 83 S.E. 2d 904 (1954); *State v. Johnson*, 199 N.C. 429, 154 S.E. 730 (1930). In the instant case, the State's evidence shows that defendant was inside the house; that upon the officers entering the house, defendant warned the officers (two of whom recognized defendant's voice because of prior contact with him) that if they continued, he intended to use force against them; that immediately thereafter a shotgun appeared from behind a curtain and was discharged; that the party behind the curtain and the law officers exchanged gunfire; and that defendant was treated at a hospital for a gunshot wound. We are of the opinion that this evidence is sufficient to raise a reasonable inference that defendant was the perpetrator of the crime and that the trial court properly submitted this case to the jury, *State v. Stephens*, *supra*.

Hodges v. Johnson

No error.

Judges BRITT and CARSON concur.

GEORGE J. HODGES v. GRANT JOHNSON, DEFENDANT AND F. F.
HODGES, INTERVENOR

No. 7411DC289

(Filed 3 July 1974)

Limitation of Actions § 4; Rules of Civil Procedure § 56—summary judgment—existing issues of fact

In an action to recover the possession of furniture located in the home of plaintiff's deceased mother, the trial court erred in entering summary judgment in favor of defendants where issues of fact existed as to the running of the statute of limitations and the ownership of the property in question; furthermore, the court erred in basing summary judgment on the testimony at a prior trial at which the court ruled the claim was barred by the statute of limitations where an appellate court held that plaintiff was entitled to a new trial because of the absence of a finding as to when the cause of action accrued.

APPEAL from *Lyon, District Judge*, 22 October 1973 Session of HARNETT County District Court. Heard in the Court of Appeals 29 May 1974.

Plaintiff instituted this action on 9 August 1971 to recover the possession of household and kitchen furniture located in the homeplace of his late mother, Maude J. Hodges, valued at \$400 and alleged to be the property of plaintiff. After denying the motion for summary judgment of each defendant, Judge Lyon heard the case, sitting without a jury. At the conclusion of the evidence, the court made the following findings of fact and conclusions of law:

"1. That the plaintiff qualified as administrator of the estate of his mother, the late Maude E. (sic) Hodges, in 1960. That he thereafter served as such administrator until the 13th day of March, 1968, when he filed his final account with the Clerk of Harnett County.

2. That this action was instituted by the plaintiff on the 9th day of August, 1971, by the filing of a Summons and

Hodges v. Johnson

Complaint and Claim and Delivery proceedings seeking to recover certain household and kitchen furniture in the home-place of the late Maude E. (sic) Hodges.

That based upon the foregoing findings of fact, the Court concludes that said action was instituted more than three years after plaintiff's cause of action accrued and is therefore barred by North Carolina General Statute 1-52(4)."

From the judgment dismissing the action, plaintiff appealed to this Court on the ground that the trial court made no finding of fact as to when plaintiff's cause of action accrued. It was plaintiff's contention that absent such a finding of fact, there was no basis on which to conclude that the cause of action was barred by the applicable statute of limitations, G.S. 1-52(4). In *Hodges v. Johnson*, 18 N.C. App. 40, 195 S.E. 2d 579 (1973), we sustained this contention and awarded plaintiff a new trial.

After certification of our opinion and prior to the new trial ordered, both parties moved for summary judgment. Judge Lyon heard no evidence and granted defendants' motion. The order granting summary judgment states that "the facts necessary to the determination of this motion are as set forth in the Transcript (of the first trial)." The court concluded from the transcript that there was no genuine issue as to any material fact. From the award of summary judgment plaintiff appealed.

W. A. Johnson for plaintiff appellant.

McCoy, Weaver, Wiggins, Cleveland and Raper, by Richard M. Wiggins, for defendant appellant.

MORRIS, Judge.

Plaintiff takes the position that the entering of summary judgment effectively denied him the new trial we awarded him on his first appeal. This position is well taken.

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Peaseley v. Coke Co.*, 12 N.C. App. 226, 182 S.E. 2d 810 (1971), cert. denied 279 N.C. 512 (1971). In ruling on such a motion, the trial court should not undertake to resolve any issues of credibility. *Credit Corp. v. McCorkle*, 19 N.C. App. 397, 198 S.E. 2d 736 (1973).

State v. Aikens

The pleadings before the court on the motions for summary judgment make no mention of the date on which plaintiff as administrator of the estate of Maude J. Hodges filed the final account. It is apparent that an issue of fact exists relative to the running of the statute of limitations. It is equally apparent that there exists a genuine issue of material fact relative to the ownership of the property in question. The trial court erred in granting summary judgment inasmuch as defendants failed to establish through their pleadings the absence of a genuine issue of material fact. Furthermore, the trial court was in error in basing his award of summary judgment on the testimony in the first trial. We held on plaintiff's first appeal that he was entitled to a new trial because there was no finding by the trial court as to when the cause of action accrued. It is not now sufficient for the trial court to enter summary judgment based upon testimony given at the first trial.

New trial.

Judges HEDRICK and BAILEY concur.

STATE OF NORTH CAROLINA v. SAMUEL FRANCIS AIKENS

No. 7410SC498

(Filed 3 July 1974)

Narcotics §§ 1, 4.5—possession of heroin with intent to distribute—
simple possession issue proper

Since it is impossible to possess a controlled substance with intent to distribute without having first possessed it, either actually upon the person or constructively, the trial court in a prosecution for possession of heroin with intent to deliver did not err in instructing the jury that they could find defendant guilty of possession with intent to distribute, guilty of simple possession, or not guilty.

APPEAL from *Long, Judge*, 4 March 1974 Session of WAKE County Superior Court. Argued in the Court of Appeals 28 May 1974.

Defendant was indicted for the possession of heroin with the intent to deliver. The court instructed the jury that they could find defendant guilty of possession with intent to distribute, guilty of simple possession or not guilty. The jury re-

State v. Aikens

turned a verdict of guilty of possession of heroin, and defendant appealed.

Attorney General Morgan, by Assistant Attorney General Jones, for the State.

William A. Smith, Jr., for defendant appellant.

MORRIS, Judge.

Defendant presents multiple assignments of error on this appeal. However, we discuss only that assignment of error which we feel merits discussion, the others having been considered and overruled.

Defendant relies heavily on *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973), wherein the Supreme Court, by Justice Moore, delved extensively into the question of lesser included offenses of various sections of G.S. 90-95. *State v. Cameron*, *supra*, specifically holds that since illegal possession of a controlled substance is not a lesser included offense of illegal sale, there is no violation of the constitutional proscription against double jeopardy in the punishment of defendant for both crimes growing out of a single transaction. While the decision in *Cameron* is not directly apposite to the case *sub judice*, it is helpful inasmuch as it sheds light on the nature of the statutory controlled substances offenses and their relation to one another. The Supreme Court rejected defendant Cameron's contention that since possession is necessary to a sale, the possession and sale constitute a single criminal offense. The Supreme Court analogized the statutory controlled substances offenses to the liquor offenses and cited with approval the following language from *State v. Chavis*, 232 N.C. 83, 59 S.E. 2d 348 (1950):

"Two things will help us in our thinking: we are not dealing with common law crimes but with statutory offenses; and not with a single act with two criminal labels but with component transactions violative of distinct statutory provisions denouncing them as crimes. Neither in fact nor law are they the same. *State v. Midgett*, 214 N.C. 107, 198 S.E. 613. They are not related as different degrees or major and minor parts of the same crime and the doctrine of merger does not apply. The incidental fact that possession goes with the transportation is not significant in law as defeat-

State v. Aikens

ing the legislative right to ban both or either. When the distinction between the offenses is considered in the light of their purpose, vastly different social implications are involved and the impact of the crime of greater magnitude on the attempted suppression of the liquor traffic is sufficient to preserve the legislative distinction and intent in denouncing each as a separate punishable offense." *State v. Cameron, supra*, at pp. 199-200.

State v. Cameron, supra, was followed by this Court in *State v. Rush*, 19 N.C. App. 109, 197 S.E. 2d 891 (1973); and *State v. Brown*, 20 N.C. App. 71, 200 S.E. 2d 666 (1973), cert. denied 284 N.C. 617 (1974). It appears that neither of those cases is apposite to the case before us. In *State v. Rush, supra*, defendant was indicted for the unlawful *distribution* of marijuana. The jury was instructed on and found defendant guilty of *possession of marijuana with intent to distribute*. This Court arrested judgment, holding under *Cameron* that distribution and possession with intent to distribute are separate offenses. In *State v. Brown, supra*, the defendant was indicted for unlawful *distribution* of codeine. This Court held that the trial court did not err in failing to instruct on possession as a lesser included offense, because under the ruling of *State v. Cameron, supra*, unlawful possession cannot be considered a lesser included offense of the crime of *unlawful distribution*. In *Cameron, supra*, at 203, the Court said "While possession may be a part of the sale, the possession may be legal and the sale illegal; therefore, they are separate and distinct offenses. Neither in fact nor law are they the same." The Court pointed out that "G.S. 90-88 prohibits the possession and the sale of narcotic drugs 'except as authorized in this article,'" *id.* at 201, and that "subsequent sections of the Narcotic Drug Act authorize certain individuals to lawfully possess narcotic drugs. However, these same persons are not always authorized to sell the drugs which they possess. Consequently, one may be guilty of the illegal sale of a narcotic drug in violation of G.S. 90-88 even though he is in possession lawfully. Illegal possession is not, then, a necessary element of the offense of unlawful sale of a narcotic drug. Certainly, a sale involves an additional fact not required for possession." *Id.*

We think the distinction between *Cameron* and the case before us too clear to permit doubt. It is impossible to *possess a controlled substance with intent to distribute* without having first *possessed* it, either actually upon the person or construc-

In re Owens

tively, with the possible exception of a conspiracy or aiding and abetting. Herein lies the clear distinction which makes *Cameron*, *Rush*, and *Brown* all inapposite to this case. We do not perceive that this logical conclusion is violative of the public policy principle enunciated in *Cameron*.

We think this situation analogous to the situation referred to by Justice Bobbitt (now C.J.) in *State v. Wells*, 259 N.C. 173, 177, 130 S.E. 2d 299 (1963), where defendant was charged with transportation and possession of "a quantity of nontax-paid whiskey for the purpose of sale, to wit 30 gallons of nontaxpaid whiskey," etc. There the Court said:

"Whether the transportation of the nontaxpaid whiskey was unlawful did not depend upon whether it was being transported for the purpose of sale. Moreover, only a person in the actual or constructive possession of nontaxpaid whiskey, absent conspiracy or aiding and abetting, could be guilty of the unlawful transportation thereof."

We, therefore, hold that the court properly instructed the jury.

No error.

Judges HEDRICK and BAILEY concur.

IN THE MATTER OF LORENZO OWENS, JUVENILE

No. 743DC544

(Filed 3 July 1974)

Infants § 10— delinquency petition based on larceny — failure of State to prove larceny

Petition alleging delinquency based upon larceny of an automobile by a minor should have been dismissed where the State's evidence showed only that the minor rode as a passenger in a stolen car and did not show that the minor acted in concert with the driver in stealing the car.

APPEAL by the juvenile from *Wheeler*, District Judge, 18 April 1974 Session of District Court held in PITT County. Heard in the Court of Appeals 18 June 1974.

In re Owens

In a Petition filed in Juvenile Court on 14 March 1974, Lorenzo Owens was charged with being a delinquent child based upon the allegation of felonious larceny of one 1964 F-85 Oldsmobile. In a Petition filed in Juvenile Court on 29 March 1974, Lorenzo Owens was charged with being a delinquent child based upon the allegation of felonious larceny of one 1964 Chevrolet Nova. Another juvenile, James Allen Wilson, was charged in Petitions alleging the same offenses of felonious larceny.

With respect to the larceny of the 1964 F-85 Oldsmobile, the evidence tended to show that the officers observed three young men peeping into cars in the parking lot of Pitt Memorial Hospital. The young men were taken to the police station. Lorenzo Owens and James Allen Wilson were two of the three. At the police station, it was found that James Allen Wilson had in his pocket the keys to the 1964 F-85 Oldsmobile which had been stolen and abandoned earlier in the day. None of the young men made a statement to the officers.

With respect to the larceny of the 1964 Chevrolet Nova, the evidence tended to show that James Allen Wilson was observed driving the stolen car. Lorenzo Owens was observed riding in the right front, or passenger, seat of the stolen car.

Judge Wheeler exercised his discretion to retain the cases as Juvenile proceedings rather than to transfer them to the Superior Court under G.S. 7A-280.

Lorenzo Owens' motion to dismiss the charge relating to the 1964 F-85 Oldsmobile was allowed. He was found to be a delinquent child based upon his guilt of larceny of the 1964 Chevrolet Nova, and has appealed. James Allen Wilson was found to be a delinquent child in both cases based upon his guilt of larceny of both cars, but he did not appeal.

Attorney General Morgan, by Deputy Attorney General Vanore, for the State.

Samuel J. Manning for the Juvenile.

BROCK, Chief Judge.

The conduct of Lorenzo Owens in being with James Allen Wilson on each occasion tends to throw a cloud of suspicion around him. However, suspicion is not enough. As Judge Wheeler

In re Owens

announced at the beginning of the hearing: "The standard of proof in each of the cases is that of beyond a reasonable doubt."

Before the State was entitled to have the case considered by the finder of the facts, it was required to offer evidence of participation by Lorenzo Owens in the offense of larceny. We agree with Judge Wheeler that the State failed to offer evidence for submission to the finder of facts in the case involving larceny of the 1964 F-85 Oldsmobile. However, we disagree with Judge Wheeler in his denial of Lorenzo Owens' motion to dismiss the case involving larceny of the 1964 Chevrolet Nova, and we reverse in that case.

In the Petition considered by the trial judge, the allegation of delinquency was based only upon the allegation that the juvenile committed larceny of the 1964 Chevrolet Nova. Therefore, before it could be determined that the juvenile was delinquent it was necessary for the State to prove the larceny. We have held in *In re Alexander*, 8 N.C. App. 517, 174 S.E. 2d 664, and *In re Roberts*, 8 N.C. App. 513, 174 S.E. 2d 667, that the State must make out a prima facie case of the commission of the crime upon which a finding of delinquency is based. Otherwise, the petition based upon allegations that the juvenile committed a crime must be dismissed.

The facts in this case are strikingly similar to those in *State v. Hughes*, 16 N.C. App. 537, 192 S.E. 2d 626. The State concedes it is unable to distinguish this case and the Hughes case. The evidence in this case merely shows that Lorenzo Owens was riding as a passenger in a stolen car. There was no evidence of conduct on his part that suggests a guilty mind. There is absolutely no evidence in this record that he was acting in concert with the driver, James Allen Wilson.

In our view, the motion of Lorenzo Owens to dismiss the petition alleging delinquency based upon larceny of the 1964 Chevrolet Nova should have been allowed.

Reversed.

Judges BRITT and BAILEY concur.

Barringer & Gaither, Inc. v. Whittenton

BARRINGER & GAITHER, INC. v. E. M. WHITTENTON, INDIVIDUALLY,
AND E. M. WHITTENTON, TDBA WHIT-TRUCK BROKERS, INC.

No. 7425DC357

(Filed 3 July 1974)

1. Rules of Civil Procedure § 58—signing of judgment—filing by clerk

When a trial judge signs a judgment not rendered in open court, he is not required also to prepare a separate order directing the clerk to file the judgment which he has signed, since Rule 58 does not apply when the judge prepares and signs the judgment.

2. Rules of Civil Procedure § 58—entry of judgment—sufficiency of notice

The objective of Rule 58 that fair notice be given to all parties of entry of judgment was achieved in this case where counsel for plaintiff filed the judgment signed by the trial judge with the clerk and simultaneously filed a certificate of service certifying that service of judgment had been made upon defendants by mailing a true copy of same.

APPEAL by defendants from *Duncan, District Court Judge*, 26 November 1973 Session of District Court held in CATAWBA County. Heard in the Court of Appeals on 11 June 1974.

This is an action wherein plaintiff sought to recover against defendants jointly and severally for materials and labor furnished by plaintiff to defendants. The defendants denied liability.

Following presentation of the evidence at a non-jury session of District Court held in Catawba County on 11 October 1971, Judge Sigmon requested that briefs be filed by plaintiff and defendants. Judgment was rendered for the plaintiff by the trial court and signed on 28 February 1973, sixteen months later. The judgment was filed in the office of the Clerk of Superior Court of Catawba County by counsel for the plaintiff, along with a certificate of service certifying that service of the judgment had been made upon defendants by mailing a true copy of same by mail.

A notice of appeal was given by defendants on 19 March 1973, but was later abandoned and the appeal dismissed. On 30 April 1973, defendants filed a motion in the cause that the judgment entered be declared null and void. A hearing was held on defendants' motion before Judge Duncan on 26 November 1973, and an order was entered denying the motion.

Barringer & Gaither, Inc. v. Whittenton

Defendants appealed to this Court.

Butner & Gaither, by James M. Gaither, Jr., for the plaintiff.

Bryan, Jones, Johnson, Hunter & Greene, by Robert C. Bryan for the defendants.

BROCK, Chief Judge.

Defendants contend the purported judgment is void because a separate order was not entered directing the clerk to file Judge Sigmon's judgment and because no notice of the filing was given to defendants by the clerk.

[1] It would seem that defendants are contending that not only must a trial judge sign a judgment when not rendered in open court, but he must also prepare a separate order directing the clerk to file the judgment which he has signed. In our view, the signing of a judgment by the trial judge requires no further directive. It is the clerk's duty to file such judgment. The third paragraph of Rule 58, relied upon by plaintiff, applies to instances where the trial judge directs the clerk to prepare and file judgment. It is inapplicable when the trial judge prepares and signs the judgment.

[2] The record discloses that the trial court made findings of fact and concluded as a matter of law that plaintiff was entitled to the amount prayed for less a set-off for improperly installed equipment. The judgment was signed by the trial judge and filed by counsel for the plaintiff with the clerk. Simultaneously, counsel for the plaintiff filed a certificate of service certifying that service of the judgment had been made upon defendants by mailing a true copy of the same. The defendants do not deny the receipt of the copy of judgment.

Rule 58 is designed to achieve the objectives of (1) making the moment of the entry of judgment easily identifiable, and (2) furnishing fair notice to all parties of the entry of the judgment. These objectives were clearly achieved by the actions of counsel for the plaintiff.

For the reasons stated, the judgment was properly entered, and effective notice of the filing of the judgment was afforded to defendants by the mailing to counsel of a true copy of the judgment. In the absence of a finding of any prejudice to de-

Carder v. Henson

fendants, the order denying defendants' motion to vacate the judgment is

Affirmed.

Judges BRITT and BALEY concur.

ROBERT EARL CARDER v. MITCHELL RAY HENSON AND THOMAS
MACK HENSON

No. 7429SC463

(Filed 3 July 1974)

Torts § 7—release of insurer — bar to subsequent action against insured

In an action to recover for personal injuries suffered by plaintiff when defendant struck the rear end of plaintiff's vehicle, the trial court properly directed verdict for defendant where the evidence tended to show that an employee of defendant's liability insurance carrier approached plaintiff in the hospital, plaintiff executed a release in exchange for \$2300, plaintiff was well educated and he testified that he had read and understood the release, and there was no showing of fraud which would vitiate the release.

APPEAL by plaintiff from *Webb, Judge*, 14 January 1974
Session of Superior Court held in RUTHERFORD County. Heard
in the Court of Appeals on 13 June 1974.

On 29 November 1971, plaintiff was injured in an automobile collision when defendant struck the rear end of plaintiff's vehicle, which had stopped in compliance with an extended stop sign on a school bus. Plaintiff suffered injuries including a fracture of the lumbar spine, a fractured ankle and a lumbar sprain.

While convalescing in the hospital, plaintiff was approached by one Gerry F. Huntley, an employee of Nationwide Mutual Insurance Company, carrier of the liability insurance of the defendant. On 8 December 1971, plaintiff executed a release in exchange for \$2,300.00.

Plaintiff later filed a complaint alleging that as a result of defendant's negligence, plaintiff was seriously injured and received permanent injuries. Plaintiff prayed for relief in the

Carder v. Henson

amount of \$50,000.00 for personal injuries and \$2,000.00 damages for the destruction of his automobile.

Defendants' answer denied plaintiff's allegations and pleaded the release signed on 8 December 1971 in bar of plaintiff's right to recover in this action. Defendants then moved for summary judgment pursuant to Rule 56.

On 16 January 1974, the trial court allowed defendants' motion for summary judgment, dismissed plaintiff's action and taxed the costs of the action against the plaintiff.

Plaintiff appealed to this Court.

Hamrick and Hamrick, by J. Nat Hamrick, for the plaintiff.

Hamrick & Bowen, by James M. Bowen, for the defendants.

BROCK, Chief Judge.

Plaintiff contends the trial court committed error by signing the summary judgment in favor of the defendants based upon the release executed by the plaintiff.

Plaintiff contends that when he signed the release, he was under the impression that the release was only for: (1) money to enable plaintiff to obtain an automobile; and (2) payment for medical expenses. Plaintiff contends that in response to a question concerning coverage of future medical expenses, he was told by the insurance representative that, "If anything comes up concerning your health, it will be taken care of in the future."

The record reveals that the plaintiff is well educated, having finished high school and completed commercial courses. The plaintiff stated:

"I said I read and understood this Release, and it says, 'and all consequential damages on account of or in any way growing out of any and all known and unknown personal injury, death and property damage,' I read that before I signed it. And I knew it covered personal injury."

Plaintiff has admitted execution of the release, and it is incumbent upon the plaintiff to prove any matter in avoidance. *Matthews v. Hill*, 2 N.C. App. 350, 163 S.E. 2d 7. Plaintiff stated that he "read the release and understood it." From the

State v. Byrd

facts presented, no fraud is shown which would vitiate the release.

"A release executed by the injured party and based on a valuable consideration is a complete defense to an action for damages for the injuries and where the execution of such release is admitted or established by the evidence it is necessary for the plaintiff (releasor) to prove the matter in avoidance." *Caudill v. Manufacturing Co.*, 258 N.C. 99, 128 S.E. 2d 128.

Plaintiff has failed to plead or offer evidence of any matter which would successfully nullify the release. The trial court properly allowed defendants' motion for summary judgment. The judgment appealed from is

Affirmed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBERT LEE BYRD

No. 7421SC474

(Filed 3 July 1974)

Criminal Law § 140— one offense — two convictions — concurrent sentences imposed

Though charges of robbery of a law officer with a firearm and assault upon a law officer with a firearm were merged, and it was error to convict defendant upon both charges, defendant was not prejudiced, since the sentences imposed upon the convictions ran concurrently.

ON *Certiorari* to review a trial before *McConnell, Judge*, 6 August 1973 Session of Superior Court held in FORSYTH County. Heard in the Court of Appeals on 20 June 1974.

Defendant was tried upon separate bills of indictment for the offenses of robbery with a firearm, assault with a firearm on a law enforcement officer, and assault.

The State's evidence tends to show that on 31 May 1973, Officer C. E. Capps of the Winston-Salem Police Department, working off-duty as a security officer at King's Department Store, observed the defendant taking ladies' pants suits from a

State v. Byrd

clothing rack, folding them up, and placing them in a diaper bag and a paper bag. Officer Capps approached defendant, identified himself as a police officer and exhibited his badge, and advised defendant that he was under arrest for concealing merchandise.

Defendant then placed a gun against Officer Capps' ribs and threatened to kill him if he did not allow defendant to go. Defendant, preceded by two Negro females, then began to back out of the store. Clyde Alberg, Assistant Manager of the store, grabbed defendant, but released him when he discovered defendant had a gun. Defendant fired a shot as he exited through the door and fled on foot.

Officer Capps pursued defendant outside on foot, fired a warning shot, and commanded defendant to halt. After pursuing defendant on foot across several streets and firing shots at defendant, Officer Capps apprehended defendant, who had been wounded in the attempted flight. Officer Capps then placed defendant in the rear area of Alberg's station wagon, which Alberg had driven to the scene in an attempt to assist Officer Capps.

While Officer Capps held defendant in the vehicle, the two Negro women approached Capps and Alberg, cursing and grabbing Capps, who was attempting to detain defendant until police assistance could arrive. Defendant fled the vehicle, attempted to get in another vehicle, and was summarily thrown out. Defendant then entered another vehicle which left the scene. Officer Capps saw defendant later that same evening at the Baptist Hospital in Winston-Salem, where he apparently was being treated for a gunshot wound. The weapon used by defendant, a .22 caliber pistol, was recovered the next day.

The defendant's evidence tends to show that on the date in question, he went to King's Department Store with his sister and two friends. Defendant picked up a bag on the floor which contained clothes. Defendant was then grabbed around the neck by Alberg, broke Alberg's grip, panicked, and ran. Defendant testified that Officer Capps shot him once, and shot at defendant four more times while he was wounded and on his knees. Defendant was unarmed throughout this series of events. A friend of defendant's then drove up and took him to the hospital.

State v. Byrd

From verdicts of guilty on all three counts and judgments rendered thereon, defendant appealed to this Court.

Attorney General Morgan, by Assistant Attorney General Banks, for the State.

Robert M. Bryant, for the defendant.

BROCK, Chief Judge.

Counsel for the defendant states that his search of the record has revealed no error prejudicial to the defendant, but requests this Court to review the record for the existence of any error which would merit a new trial.

We note that defendant was charged and convicted of *robbery* of Officer C. E. Capps with a firearm, and was also charged and convicted of *assault* on Officer C. E. Capps with a firearm. It seems that, under the facts in this case, these two charges are merged. It is difficult to see how defendant could have robbed Officer Capps by the use of a firearm without, at the same time, assaulting Officer Capps with a firearm. There is no evidence of an assault upon Officer Capps with a firearm other than during the commission of the robbery. Nevertheless, the sentence on the conviction of assault on Officer Capps with a firearm runs concurrently with the sentence on the conviction of the robbery of Officer Capps with a firearm. We, therefore, perceive no prejudice to defendant.

Our review of the record discloses no error prejudicial to defendant.

No error.

Judges CAMPBELL and HEDRICK concur.

Griffin v. Wheeler-Leonard & Co.

ROBERT J. GRIFFIN AND WIFE, FRANCES C. GRIFFIN v. WHEELER-LEONARD & CO., INC.; LONNIE E. WHEELER; M. D. FLETCHER, JR. AND WIFE, BONNIE T. FLETCHER, AND M. D. FLETCHER CONSTRUCTION COMPANY, INC.

No. 7414DC268

(Filed 3 July 1974)

1. Sales § 14—breach of warranty—exclusion of testimony—absence of prejudice

In a breach of warranty action to recover for deficiencies in a house purchased by plaintiffs, including the accumulation of water in the crawl space under the house, plaintiffs were not prejudiced by the exclusion of testimony that they had never seen a house with a crawl space since the male plaintiff had given such testimony before objection, or by the exclusion of testimony that the part of Nevada where they formerly lived had an average rainfall of 3.56 inches.

2. Sales § 14; Witnesses § 5—breach of warranty—exclusion of corroborative evidence—directed verdicts—absence of prejudice

In a breach of warranty action to recover for deficiencies in a house purchased by plaintiffs, plaintiffs were not prejudiced by the exclusion of letters written by them which were offered for the purpose of corroborating their testimony of defects in the house since the court directed verdicts for defendants and the effect of the corroborative evidence would be cumulative and would add nothing to plaintiffs' position relative to the directed verdicts.

3. Sales § 14; Witnesses § 7—breach of warranty—refusal to allow witness to use notes—absence of prejudice

In a breach of warranty action to recover for deficiencies in a house purchased by plaintiffs, the court's refusal to allow plaintiff to testify as to defects in the house from a set of typewritten notes, while erroneous, was not prejudicial to plaintiffs since a different result would not likely have ensued.

4. Sales § 19—hearsay appraisal evidence—damages issue not reached

In a breach of warranty action to recover for deficiencies in a house purchased by plaintiffs, the court's erroneous admission of hearsay testimony concerning an appraisal of the house by a person not in court was not prejudicial to plaintiffs where a verdict was directed in favor of defendants and an issue of damages was thus not reached.

5. Sales § 17—purchase of house—breach of warranty—insufficiency of evidence

In an action to recover from the builder-vendor for deficiencies in a house purchased by plaintiffs, plaintiffs' evidence was insufficient to establish a right to recover under either express or implied warranty where they failed to present any evidence that the house as constructed was not suitable for habitation.

Griffin v. Wheeler-Leonard & Co.

APPEAL from *Moore, Judge*, 15 October 1973 Session, DURHAM County District Court. Argued in the Court of Appeals 28 May 1974.

Plaintiffs bought from defendants, M. D. Fletcher, Jr., and Bonnie T. Fletcher, a newly constructed residence in Blue-stone Estates Subdivision in Durham County. Plaintiffs allege that the house was constructed by M. D. Fletcher Construction Company, Inc., and that the sale was arranged by Wheeler-Leonard and Co., Inc., and its authorized agent, Lonnie E. Wheeler.

Plaintiffs further allege that once they moved into the house, they noticed many defects in the construction of the house. Among these alleged defects were the following: inadequate drainage of the lot; cracking tile and masonry; improperly fitting garage door; leaks in the roof; the plumbing and the septic tank; and inadequate attic ventilation. In addition, they allege that there was an accumulation of water in the crawl space under the house. Defendant Wheeler told plaintiffs that the water would dry up, but at the time of the institution of this action, it had not.

Plaintiffs base their complaint on an express warranty made to them by Wheeler that the home in question was a quality home and that it was constructed of quality materials. They allege that they relied on these misrepresentations—and the representation that the water in the crawl space would dry up—to their detriment. The complaint is also based on breach of implied warranty in that “inadequate measures were taken to assure positive drainage of basement less space . . .” in violation of the building code. As a result of the alleged deficiencies, plaintiffs seek to recover the difference in fair market value of the dwelling as it should have been constructed and as it was actually constructed.

The evidence tended to show that plaintiffs had moved to Durham in 1970 from Southern Valley, just outside Las Vegas, Nevada. There was extensive testimony concerning the circumstances surrounding the purchase of the house and the alleged deficiencies. There was testimony to the effect that the porosity of the soil in the Bluestone Estates area is such that it doesn't readily absorb water as well as the soil in other areas of Durham County.

Griffin v. Wheeler-Leonard & Co.

At the close of plaintiffs' evidence, directed verdict was granted with respect to M. D. Fletcher Construction Company, Inc. From this ruling there was no appeal. At the close of all the evidence, the court directed the verdict in favor of the remaining defendants. From the entry and signing of judgment, plaintiffs appealed.

Powe, Porter, Alphin, and Whichard, P.A., by J. G. Billings, for plaintiff appellants.

Blackwell M. Brogden for defendant appellees.

MORRIS, Judge.

[1] Plaintiffs contend that the trial court erred in its refusal to allow plaintiffs to testify concerning the environmental conditions and the residential construction in the part of Nevada where they formerly resided. The record indicates that had plaintiffs' testimony been allowed it would have been to the effect that Southern Nevada had an average rainfall of 3.56 inches, and that plaintiffs had never seen a house with a crawl space. Plaintiffs have not been prejudiced by the exclusion of the testimony concerning crawl spaces, for Robert Griffin had, prior to objection of opposing counsel, testified that he didn't recall seeing a house with a crawl space in Southern Nevada. Nor have plaintiffs shown that the excluded testimony concerning rainfall prejudiced their case. This assignment of error is overruled.

[2] Error is assigned also to the exclusion of letters written by plaintiffs to the Security Savings and Loan Association, the Ethics Committee of the Home Builders Association, and the Attorney General's Office. Plaintiffs take the position that these letters were admissible as corroboration of their testimony of the defects in the house. Assuming, *arguendo*, that the exclusion of these letters was error, plaintiffs could not have been prejudiced. Plaintiffs appeal from the granting of a directed verdict in favor of the adverse parties. In evaluating the sufficiency of the evidence to withstand such a motion, the trial court views plaintiffs' evidence in the light most favorable to them and gives them the benefit of all reasonable inferences arising therefrom. *Barringer v. Weathington*, 11 N.C. App. 618, 182 S.E. 2d 239 (1971). The effect of this corroborative evidence would be cumulative at best, and it would add nothing to plaintiffs' position relative to the directed verdicts. There has been no prejudice, and this assignment is likewise overruled.

Griffin v. Wheeler-Leonard & Co.

[3] Plaintiff next assigns error to the court's ruling that he could not testify from a set of typewritten notes concerning defects in the house. We agree that this testimony should have been allowed. However, we have stated many times that a showing of error will not suffice without a showing that absent the error a different result would likely ensue. *State v. Quick*, 20 N.C. App. 589, 202 S.E. 2d 299 (1974) ; *State v. Brown*, 20 N.C. App. 413, 201 S.E. 2d 527 (1974).

[4] Plaintiffs are likewise correct in their contention that the trial court erred in allowing irrelevant hearsay testimony concerning an appraisal of the house made by a party not in court. However, we fail to see that there was any prejudice in this ruling. Prejudice from such evidence could only have been manifested in an award of damages by the jury. The possibility of such prejudice was extinguished with the directed verdict.

[5] Finally, plaintiffs assign error to the directed verdicts in favor of defendants Wheeler-Leonard Company, Inc., M. D. Fletcher, and Bonnie Fletcher. As we have stated, there is no appeal from the directed verdict in favor of M. D. Fletcher Construction Company, Inc. With respect to the remaining defendants, we hold that the verdicts were properly directed. After a careful review of the evidence on the entire record, we conclude that plaintiffs have failed to present any evidence that the house as constructed was not suitable for habitation. On the contrary, plaintiff Robert Griffin testified that the house was livable. Thus, plaintiffs have not established their right to recover under an implied warranty of fitness for habitability held by us to exist in *Hartley v. Ballou*, 20 N.C. App. 493, 201 S.E. 2d 712 (1974). With respect to the alleged breach of express warranty, we hold that plaintiffs have likewise failed to establish that the house was unfit for habitation. The motions for directed verdict were properly granted in favor of all defendants.

No error.

Judges HEDRICK and BAILEY concur.

State v. Cogdell

STATE OF NORTH CAROLINA v. NATHAN GLENN COGDELL

No. 741SC470

(Filed 3 July 1974)

Criminal Law § 117—prior convictions of defendant—instructions improper

Where defendant testified but did not otherwise put his character in issue, the trial court erred in instructing the jury that they should consider defendant's prior convictions which defendant admitted as substantive evidence of his guilt.

ON *certiorari* to review the Order of *Martin, (Perry)*, Judge, entered at the 5 November 1973 Session of Superior Court held in PASQUOTANK County.

Defendant was indicted for armed robbery.

The State's evidence tended to show the following. On the morning of 31 March 1973, W. J. Alexander, proprietor of Alexander's Grocery in Elizabeth City, was in the store alone when defendant came in and, pointing a gun at Alexander, demanded money. Defendant pushed Alexander to the floor and removed \$50.00 or more from the cash register.

In addition to denying he perpetrated the robbery, defendant stated that he had never been in Alexander's Grocery and testified that he was with friends on the Elizabeth City State University campus when the robbery allegedly occurred. Several witnesses gave testimony tending to corroborate defendant's alibi claim.

Upon a verdict of guilty of common law robbery, defendant was sentenced to a prison term of eight to ten years.

Attorney General Robert Morgan by William A. Raney, Jr., Associate Attorney, for the State.

John H. Harmon for defendant appellant.

VAUGHN, Judge.

Defendant brings forward only one assignment of error and that is to the following portion of the Judge's charge:

"The State, by virtue of cross-examination of the defendant, has brought into the record some evidence of the

State v. Cogdell

defendant's prior violation of the law, these questions also having been asked by counsel for the defendant. This, also, is substantive evidence, ladies and gentlemen, of guilt or innocence, but the jury in this case is cautioned that you cannot convict the defendant simply because you believe that he has previously violated some law, or that by virtue of that he may have had reputation or character."

On direct examination, defendant testified as follows:

"I have had one traffic ticket and I have been convicted of shoplifting in Norfolk, Virginia, my freshman year, the fall of 1969. It was one weekend, a Saturday. I went to Norfolk with some friends. We went inside a store and I got this coat and I got a clock, and something happened in the store and I went beyond the counter and a police officer grabbed me and I then panicked and started running. I was charged with shoplifting and paid a fine. I pleaded guilty to the charge and was fined \$100 and placed on good behavior for one year."

On cross-examination, defendant stated:

* * *

"I have been convicted of speeding and shoplifting in Norfolk, Va., I took a coat and a clock. I know that shoplifting is a form of stealing."

Some of the State's evidence tended to show that defendant had been involved in larcenies from Alexander's Grocery on 27 February and 27 March 1973. In an effort to refute this, defendant called a teacher at Elizabeth City State University, who testified as follows:

"I teach a course in Lab Policy. It was taught February, March, April, 1973. The defendant was a student in the class. The class met every Tuesday from 10:00 o'clock until 10:50. That class met on February 27, 1973. The defendant was present on that date. On March 27, 1973, he was also present. He passed in a paper that day; it was a report on Government regulations of business act. He passed in two papers that semester, one on March 27 and one on April 3, 1973. He was absent only one time the whole semester on April 10, 1973, and made an A— on the final exam, and was given A for the course."

State v. Cogdell

On cross-examination by the State, the witness said:

"We had a spring break at the school. It started March 5 and went through March 16. Cogdell was a good student in my class. The class lasted 50 minutes."

We have set out the only evidence in the record before us which could possibly relate to the character of defendant.

If a defendant testifies but does not otherwise put his character in issue, he is subject to impeachment by evidence of bad character. In that case his character goes to credibility only and is not substantive evidence of guilt or innocence. If a defendant is a witness and also puts his character in issue, the State may produce testimony as to his bad character, and all the evidence of character, good and bad, is considered as substantive evidence of his guilt or innocence and also as bearing upon his credibility as a witness. 1 Stansbury, North Carolina Evidence, Brandis Revision, § 108.

Here the defendant testified but did not otherwise put his character in issue. His admission, on direct, of one conviction for speeding and one for shoplifting could hardly constitute an offer by him of evidence of good character. At most, it was an attempt to display candor and thus soften the blow of the reasonable certainty that the solicitor would elicit the same information on cross-examination. *But see State v. McDaniel*, 272 N.C. 556, 158 S.E. 2d 874.

Defendant called several witnesses in his defense but asked none of them questions relating to his character or reputation. The teacher who testified that defendant was in class during times relevant to the inquiry was not asked about defendant's character or reputation on direct examination. It was the solicitor who elicited the statement from him that defendant was a "good student."

We cannot say that the error in the charge was nonprejudicial. The evidence was sharply conflicting. Although the victim's identification of defendant was plausible and unequivocal, defendant did offer the testimony of at least one witness in addition to defendant's testimony which, if believed, would show that he was not present at the scene of the robbery. We cannot say that the Judge's instruction to the jury that they should consider defendant's prior convictions (which defendant admitted) as substantive evidence of his guilt, was harmless error.

State v. Benfield

New trial.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. MICHAEL DAVIS BENFIELD

No. 7426SC417

(Filed 3 July 1974)

1. Criminal Law § 145.1—revocation of probation

The record supports the trial court's determination that defendant violated the terms of his probation by violating the penal laws of the State and by moving his residence without the written permission of his probation officer.

2. Criminal Law § 145.1—revocation of probation—prior review of file—failure to bring defendant before court

Court's authority to revoke defendant's probation in a proceeding under G.S. 15-200 was not affected by the failure to bring defendant before the court when his file was previously reviewed by the court pursuant to G.S. 15-205.1.

APPEAL by defendant from an order revoking probation entered by *Ervin, Judge*, at the 29 October 1973 Session of Superior Court held in MECKLENBURG County.

After pleading guilty to using obscene and indecent language over the telephone, defendant Michael Davis Benfield was sentenced to two years imprisonment, suspended and placed on five years probation on 2 February 1970. As a condition of probation, defendant was required to remain in a specified area and was not to change his place of residence without written consent from the probation officer. Other conditions of probation were that defendant not violate any penal law of any state and be of general good behavior.

On 12 April 1973, Judge Grist entered an order, in relevant part, as follows:

"IT APPEARING that the above named defendant was placed on probation by the Honorable T. D. Bryson, Jr., Judge holding this Court on the 2nd day of February, 1970, for a period of 5 years, and it further appearing and this Court finds as a fact after reviewing the case file in accord-

State v. Benfield

ance with General Statutes 15-205.1 that probation supervision is serving a useful purpose.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT the probation be and the same is hereby continued under the former order of the Court."

Defendant was not brought before Judge Grist and was unaware that his file was being reviewed by the court.

In May 1973, defendant pled guilty to a charge of failing to pay a motel bill and was sentenced to 30 days, suspended for six months. The offense occurred on 6 August 1972. On or about 15 June 1973, defendant moved from Charlotte, North Carolina, to Marietta, Georgia, with the intention of accepting a job offer in the Atlanta area. The move was made without written permission. Defendant returned to Charlotte, North Carolina, on or about 11 July 1973.

After proper notice and hearing on 2 November 1973, Judge Ervin determined that defendant had violated the terms and conditions of his probation. The probation was revoked, and defendant was ordered to begin serving the two-year term which had initially been suspended. Defendant appealed.

Attorney General Robert Morgan by Richard F. Kane, Associate Attorney, for the State.

Elam & Stroud by William H. Elam for defendant appellant.

VAUGHN, Judge.

[1] The record supports Judge Ervin's determination that defendant violated the terms of his probation in that he violated the penal laws of the State and moved his residence without the written permission of his probation officer.

[2] Defendant appears to contend, nevertheless, that Judge Ervin could not revoke defendant's probation because of alleged errors in earlier review before Judge Grist. Defendant contends that he was substantially prejudiced and his constitutional rights violated because the probation officer did not physically bring him before the court for review under G.S. 15-205.1, which provides:

"Mandatory review of probation.—It shall be the duty of the probation officer in all cases referred to him to

State v. Harris

bring the probationer before the appropriate court having jurisdiction for review by the judge to determine whether the probationer should be released from probation after the probationer has actually been on probation for one year, if the period of probation was three years or less, or he has been on probation for three years if the period of probation was for more than three years. The court shall review the probationer's case file and determine whether he should be released from probation. This section shall not restrict the court's power to continue, extend, suspend or terminate the period of probation at any time as provided in G.S. 15-200."

The quoted statute leaves it unclear whether the probationer need be present when the appropriate court "review[s] the probationer's case file" for possible early release from probation. The better practice would seem to be to bring the probationer before the court.

Compliance, or lack of it, with G.S. 15-205.1, however, does not restrict the court's power to continue, extend, suspend or terminate the period of probation at any time by appropriate proceeding under G.S. 15-200. The proceeding before Judge Ervin was duly conducted pursuant to G.S. 15-200, and the order from which defendant appealed is affirmed.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. LINWOOD JEROME HARRIS

No. 7413SC261

(Filed 3 July 1974)

Criminal Law § 128—improper question—denial of mistrial

In an armed robbery prosecution, the solicitor's improper question whether an officer knew what defendant was being held for when the officer saw him at the sheriff's office and his request that the court rule on the question before the officer answered it, which indicated that the solicitor knew the question was improper, were not sufficiently prejudicial to require the trial court to grant defendant's motion for mistrial.

State v. Harris

APPEAL by defendant from *Brewer, Judge*, 10 September 1973 Session of BRUNSWICK County Superior Court.

The defendant was charged in a bill of indictment with the felony of armed robbery. A plea of not guilty was entered. From a judgment of guilty as charged and the imposition of a twenty-five year sentence thereon, the defendant gave notice of appeal.

Facts necessary for the determination of this case are set forth in the opinion.

Attorney General Robert Morgan, by Associate Attorney General Robert P. Gruber for the State.

Murchison, Fox and Newton, by Carter T. Lambeth for the defendant-appellant.

CARSON, Judge.

The sole question presented by this appeal is whether the trial judge committed error by refusing to grant the defendant's motion for mistrial based upon allegedly improper remarks made by the solicitor during the course of the trial. The victim of the crime, a husband and wife, operated the Camellia Motel in Leland. They testified as to the details of the robbery and that they were able to positively identify the defendant. Officer George B. Reid testified concerning his investigation of the robbery and corroborated the testimony of the victim. On cross-examination Officer Reid testified that the defendant was in the custody of the New Hanover sheriff's office when he first saw him. On redirect examination the solicitor propounded the following question:

MR. GREER: Before you answer this question, I want the Judge to rule on it. Do you know what Linwood Jerome Harris was being held for?

MR. LAMBETH: Objection.

THE COURT: Sustained.

At this point the defendant made a motion for a mistrial. This motion was denied.

Certainly, this question was improper. By requesting the judge to rule on it before it was answered, the solicitor clearly indicated that he also knew it was improper. Had the question

State v. Elliott

been answered, a mistrial might have been necessary. However, the trial court quite properly sustained the defendant's objection.

We disapprove of the action of the solicitor in asking an obviously improper question to try to prejudice the jury by the question rather than the expected answer. We do not, however, deem it to be so prejudicial that the failure of the trial court to grant the mistrial was an abuse of discretion. The granting or denying of a motion for a mistrial is within the sound discretion of the trial court. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966); *State v. Williams*, 7 N.C. App. 51, 171 S.E. 2d 39 (1969). He is in the best position to observe its impact upon the jury and to determine its effect upon the overall trial. His ruling will not be reviewed in absence of an abuse of discretion.

Here, the trial court promptly sustained the defendant's objection. There was an abundance of evidence to sustain the verdict of the jury. The one improper question by the solicitor is not sufficiently prejudicial for us to hold that the trial court abused its discretion in refusing to grant a motion for a mistrial. We hold, therefore, that the defendant received a fair and impartial trial free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. HOYT ELLIOTT

No. 7429SC479

(Filed 3 July 1974)

1. Constitutional Law § 32; Criminal Law § 143—revocation of suspension of sentence—absence of defense counsel

The trial court did not err in hearing a motion to activate defendant's suspended sentence when defendant was not represented by counsel where defendant informed the court that he was able to employ an attorney, the hearing was set for a later date, and when the case was called the attorney employed by defendant did not appear at the hearing because of involvement in a trial in another county, since defendant should have employed another attorney if the one he desired was unavailable.

State v. Elliott

2. Criminal Law § 143—revocation of suspension of sentence—evidence

In a hearing to revoke a suspended sentence, the court is not bound by strict rules of evidence, and all that is required is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that defendant, without lawful excuse, violated a valid condition of the suspended sentence.

3. Criminal Law § 143—revocation of suspension of sentence—failure to close club

The evidence was sufficient to support the court's determination that defendant breached a condition of his suspended sentence for possession of liquor for purpose of sale by failing to close a certain club which he operated where a deputy sheriff testified he had been to the club within the past six months and found people sitting around inside the building drinking beer, he saw defendant at the club on the several occasions he went there in the past year, and he found several cases of beer in the building two weeks before the hearing.

APPEAL by defendant from *Martin (Robert)*, Judge, January 1974 Session of Superior Court held in McDOWELL County.

On 15 June 1972, in superior court, defendant pleaded guilty to possession of intoxicating liquor for purpose of sale. The court entered judgment imposing an 18 months prison sentence; execution of the sentence was suspended for five years upon conditions that defendant pay a fine of \$500 and costs, and that he close the Am-Vet Club building.

On 8 January 1974, defendant was served with written notice from the district attorney to appear in the superior court on Friday, 11 January 1974, and show cause, if any he had, as to why the suspended sentence should not be put into effect.

On 11 January 1974, Judge Exum, presiding over McDowell Superior Court, ordered that the hearing on the district attorney's motion be held on Wednesday, 16 January 1974, at 9:30 a.m. A hearing was conducted on Friday afternoon, 18 January 1974, by Judge Robert M. Martin who was then presiding over McDowell Superior Court. Following the hearing, the court found that defendant had willfully failed to close the Am-Vet Club building, adjudged that he had breached a valid condition upon which the execution of his prison sentence was suspended, and ordered that the suspension be revoked and that the prison sentence be activated. Defendant appealed.

State v. Elliott

Attorney General Robert Morgan, by Associate Attorney Charles J. Murray, for the State.

Davis and Kimel, by Horace M. Kimel, Jr., and L. Wingate Cain, Jr., for defendant appellant.

BRITT, Judge.

[1] First, defendant contends the court erred in hearing the motion to activate his suspended sentence because he was not represented by counsel. We find no merit in this contention.

Defendant does not contend that he was indigent and that an attorney should have been appointed for him. He argues that he had employed an attorney from another county to represent him and that the attorney was unable to appear at the hearing because of involvement in a trial in that county.

The record reveals: When this cause was before Judge Exum during the first week of the session, defendant advised the court he was able to employ a lawyer; Judge Exum set the cause for hearing on the following Wednesday and told defendant the cause would be heard. On Friday morning, 18 January 1974, the last day of the session, the district attorney informed defendant the cause definitely would be heard that day. The case was called at 4:00 p.m. and defendant stated that he had employed a lawyer from Asheville but had not paid him. The district attorney stated that the attorney had not contacted him about the case. Judge Martin proceeded with the hearing.

We hold that, under the facts appearing, the court did not err in proceeding with the hearing. Defendant had been given ample opportunity to employ a lawyer. If the attorney he desired was not available, he should have employed another.

Defendant contends the court's finding that he had violated a condition of his suspended sentence was not supported by sufficient evidence. We find no merit in this contention.

[2] A proceeding to revoke a suspended sentence is not a criminal prosecution but is a proceeding solely for the determination by the court as to whether there has been a violation of a valid condition of suspension so as to warrant putting into effect a sentence theretofore entered. In conducting the proceeding, the court is not bound by strict rules of evidence, and all that is required is that there be competent evidence reasonably sufficient to

State v. Blakely

satisfy the judge in the exercise of a sound judicial discretion that the defendant had, without lawful excuse, violated a valid condition of the suspended sentence. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967).

[3] The evidence presented at the hearing included the testimony of a deputy sheriff of McDowell County summarized as follows: He was familiar with the Am-Vet's Club operated by defendant in McDowell County. Within six months prior to the hearing, he had been to the club, found the building open with people on the inside sitting around drinking beer. He searched the building some two weeks prior to the hearing and found several cases of beer. On several occasions that he went to the club during 1973 he saw defendant there.

We hold that the evidence was sufficient to support the court's finding that defendant had violated a condition of his suspended sentence.

Affirmed.

Judges MORRIS and BALEY concur.

STATE OF NORTH CAROLINA v. JOSEPH CLIFTON BLAKELY

No. 748SC520

(Filed 3 July 1974)

Criminal Law § 75—statements in patrol car—custodial interrogation—necessity for voir dire

Statements made by defendant in response to an officer's questions while the officer was filling out an "alcoholic influence report form" after defendant had been placed under arrest and while he was sitting in a patrol car with the officer were the result of custodial interrogation, and the trial court erred in the admission of such statements over defendant's general objections without conducting a *voir dire* and making findings as to whether the statements were voluntarily and understandingly made after defendant had been given the *Miranda* warnings.

APPEAL by defendant from *Lanier, Judge*, 21 January 1974 Session of Superior Court held in WAYNE County.

Defendant was charged in a warrant with operating a motor vehicle on a public highway while under the influence of intoxi-

State v. Blakely

cating liquor. After trial and conviction in the District Court, he appealed to the Superior Court, where he again pled not guilty.

The arresting highway patrol officer testified that he saw defendant driving on a public road at a high rate of speed, that defendant lost control of his car, and that the car spun around backwards into the ditch. The patrolman went immediately to the ditched car and found defendant to be the only occupant. Defendant's eyes were red and glassy, his face was flushed, and there was a strong odor of alcohol on his breath. The officer arrested defendant for driving under the influence, placed him in the patrol car, and advised him of his rights under the Miranda decision. The patrolman could not recall whether defendant answered yes or no to the question as to whether he wanted a lawyer, but defendant did tell the officer that he understood his rights. The officer then asked defendant the questions on the "alcoholic influence report form," after which he took defendant to jail, where a breathalyzer test was given which showed that defendant had .17 percent of alcohol in his blood.

The jury found defendant guilty, and from judgment on the verdict, defendant appealed.

Attorney General Robert Morgan by Associate Attorney E. Thomas Maddox, Jr. for the State.

Herbert B. Hulse and George F. Taylor for defendant appellant.

PARKER, Judge.

Defendant assigns error to the trial court's allowing the arresting officer to testify over his objections to statements made by defendant in response to the officer's questions asked while the officer was filling out the "alcoholic influence report form." The officer testified that in answering these questions defendant stated, among other things, that he was the operator of his vehicle, that he had been drinking, and that he was under the influence of an alcoholic beverage. Defendant points out that the court overruled his objections to this testimony without conducting any voir dire examination and without making any findings that his statements had been freely and voluntarily made.

State v. Brinkley

"One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights as any other accused." *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462; accord, *State v. Lawson*, 285 N.C. 320, 204 S.E. 2d 843; *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849. Here, defendant's statements were made after he had been placed under arrest and while he was sitting in the patrol car with the officer immediately before the officer took him to jail. Thus, there can be no question but that the statements were made in response to custodial interrogation. Although there was ample evidence from which the trial court could have made express findings that defendant's statements were voluntarily and understandingly made after he had been properly advised by the officer of his constitutional rights under the *Miranda* decision, the court failed to make such findings and simply overruled defendant's general objections. "A general objection is sufficient to challenge the admission of a proffered confession if timely made," *State v. Edwards*, 274 N.C. 431, 163 S.E. 2d 767, and when the objections were interposed in the present case, before allowing the officer to testify as to defendant's statements the trial judge should have conducted a *voir dire* examination and made findings of fact as to the circumstances under which the statements were made. *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1. For error in admitting testimony as to defendant's inculpatory statements without making findings of fact which would establish that the statements had been voluntarily and understandingly made, defendant is entitled to a

New trial.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. WILLIAM BRINKLEY

No. 745SC415

(Filed 3 July 1974)

1. Criminal Law § 26; Narcotics § 5—possession and sale of same heroin—two crimes

Defendant was not placed in double jeopardy by his conviction for both possession and sale of the same heroin.

State v. Brinkley

2. Narcotics § 3— purchase of bags of heroin— observation of other similar bags

In a prosecution for possession and sale of heroin, the trial court properly allowed the State's witnesses to testify that, at the time they purchased two bags of heroin from defendant, they observed other small glassine bags with white powder in the pouch from which the two purchased bags were taken.

APPEAL by defendant from *Cohoon, Judge*, 26 November 1973 Session of Superior Court held in NEW HANOVER County.

By separate bills of indictment, proper in form, defendant was charged with (1) unlawful possession of a controlled substance, "to wit: two (2) dosage units of heroin," and (2) felonious distribution of the same heroin. The cases were consolidated for trial and defendant pled not guilty to both charges. The jury found him guilty in both cases, and from judgments imposing consecutive prison sentences, defendant appealed.

Attorney General Robert Morgan by Associate Attorney James Wallace, Jr., for the State.

Charles E. Rice III for defendant appellant.

PARKER, Judge.

[1] Appellant first assigns error to the denial of his motion to compel the State to elect to try him either on the charge of possession of heroin or on the charge of sale of heroin. He contends that, the heroin involved in both cases being the same and the only evidence of possession being that shown when the distribution took place, denial of his motion subjected him to double jeopardy and to multiple punishment for the same offense. Our Supreme Court has held to the contrary in *State v. Thornton*, 283 N.C. 513, 196 S.E. 2d 701, and *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481, and on authority of those decisions appellant's first assignment of error is overruled.

[2] The only other assignment of error brought forward in appellant's brief challenges the trial court's action in allowing the State's witnesses to testify, over defendant's objections and motions to strike, concerning their observations of certain other "small glassine bags with white powder," similar to the two bags which were purchased from defendant, which they saw at the time of the purchase in a small brown leather pouch in

Clark v. Williams

defendant's possession. The witnesses testified that the two glassine bags containing white powder, later determined to be heroin, which defendant sold, were removed from this same pouch by the defendant immediately prior to the sale. The testimony concerning the pouch and its contents was clearly relevant, and this assignment of error is also overruled.

No error.

Judges HEDRICK and VAUGHN concur.

JOE CLARK v. CHARLIE WILLIAMS

No. 742SC550

(Filed 3 July 1974)

1. Appeal and Error § 39—failure to docket record in apt time

Appeal is subject to dismissal where the record on appeal was not docketed in apt time. Court of Appeals Rule 5.

2. Appeal and Error § 39—extension of time for docketing—extension of time to serve case—extension to undesignated date

An extension of time to docket the record on appeal is not accomplished by an extension of time to serve the case on appeal or by an order purporting to extend the time for an indefinite period or to an undesignated date.

3. Automobiles § 57—intersection accident—jury question

Jury question was presented in an action arising from an intersection accident where the intersection was controlled by a traffic light and each party contended he had the green light.

APPEAL by defendant from *Martin (Perry)*, Judge, 7 January 1974 Session of Superior Court held in MARTIN County.

This litigation arises from a two-car collision which occurred at an intersection. Each party contended the other was negligent. The jury returned verdict for the plaintiff, and from judgment on the verdict, defendant appealed.

Gurganus & Bowen by Edgar J. Gurganus; and Griffin & Martin by Clarence W. Griffin for plaintiff appellee.

Milton E. Moore for defendant appellant.

State v. Brake

PARKER, Judge.

[1] The judgment appealed from was dated 10 January 1974. The record on appeal was docketed in this Court on 14 May 1974. No order of the trial tribunal extending the time for docketing appears in the record. For failure of appellant to docket within apt time, the appeal is subject to dismissal. Rule 5, Rules of Practice in the Court of Appeals.

[2] The record does contain orders dated 11 March and 11 April 1974 extending the time for serving the case on appeal, but an extension of time to docket the record on appeal is not accomplished by an extension of time to serve case on appeal. *Kurtz v. Insurance Co.*, 6 N.C. App. 625, 170 S.E. 2d 496; *Smith v. Starnes*, 1 N.C. App. 192, 160 S.E. 2d 547. Each of the orders referred to contains the statement that "the time for docketing said case is extended to _____." Under Rule 5, the trial tribunal may, for good cause, extend the time for docketing the record on appeal for a period not exceeding sixty days, but this cannot be accomplished by an order purporting to extend the time for an indefinite period or to an undesignated date.

[3] Nevertheless, we have reviewed such of appellant's assignments of error as are brought forward in his brief and find no prejudicial error. Traffic at the intersection where the collision occurred was controlled by a traffic light, and each party contended he had the green light. The case was one for the twelve and on sharply conflicting evidence their verdict was for the plaintiff.

Appeal dismissed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. JESSE LEE BRAKE

No. 747SC421

(Filed 3 July 1974)

Homicide § 21—gunshot wound—death from blood clot—sufficiency of evidence

State's evidence was sufficient to show that deceased died as a result of defendant's unlawful act where such evidence tended to

State v. Brake

show that defendant shot and felled deceased who was shortly thereafter admitted to the hospital suffering from a single gunshot wound and that deceased later died of a blood clot caused by the original gunshot wound.

APPEAL by defendant from *Webb, Judge*, 29 October 1973 Session of Superior Court held in NASH County.

Defendant was indicted for the first degree murder of William G. Richardson.

Evidence for the State tended to show the following. About 12:00 a.m. on 11 August 1968, Viola Davis Battle, George Battle and defendant were together in an automobile operated by George Battle. Defendant requested George Battle "to take him by [defendant's] house so that [defendant] could get his gun, he said he was tired of fussing about it." "It was a single barrel shotgun, that you could break open and stick the bullet in it." After defendant got his shotgun, the trio went to a party but stayed only a few minutes. The group then proceeded towards Viola Battle's mother's house. En route they saw the deceased, William G. Richardson, coming across a field. Richardson "hollered at George and George stopped real quick." As defendant started to get out of the car, George Battle attempted to stop him, but defendant threatened "to shoot [him] too." Defendant jumped out of the car and shot Richardson. Immediately prior to the shooting, defendant had said several times that he was going "to kill the _____ on sight." Richardson died on 17 August 1968. Defendant was charged with the murder in a warrant issued 30 August 1968, but was not apprehended until 27 August 1973.

Defendant offered no evidence. He was convicted of murder in the second degree and was sentenced to imprisonment for twenty-five years.

Attorney General Robert Morgan by Jacob L. Safron, Assistant Attorney General, for the State.

Moore, Diedrick & Whitaker by L. G. Diedrick for defendant appellant.

VAUGHN, Judge.

Defendant contends that the State failed to show that deceased died as a result of defendant's unlawful act. The gist

Laws v. Laws

of his argument is that the eyewitness testified defendant shot deceased with a shotgun but that the attending physician testified that deceased died of a pulmonary embolism resulting from a "bullet" wound in the abdomen. The bullet wound was described as being about one-half inch in diameter. On cross-examination, defendant elicited the fact that the doctor's notes of the patient's history recited "[t]his 23 year old colored male was brought to the emergency department at 3:45 a.m. after being shot with a pistol at 3:15 a.m. and complains of severe pains in the abdomen." The bullet or slug was apparently never removed from the body. Defendant's assignment of error must fail. The State's evidence was that defendant shot and felled Richardson who was shortly thereafter admitted to the hospital suffering from a single gunshot wound. Later he died of a blood clot caused by the original gunshot wound. Any contradictions in the State's evidence were for the jury. Presumably, the jury realized that a shotgun can be loaded with a shell or cartridge containing many small "bullets" or "missiles," or a single large "bullet" or "missile," sometimes called a slug.

The remaining assignments of error are also without merit.

Defendant's court appointed counsel has asked us to examine the record for possible errors that he has been unable to detect. We have done this and conclude that defendant has had a fair trial free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

WESLEY LAWS, JR. v. THELMA P. LAWS

No. 7427DC489

(Filed 3 July 1974)

Constitutional Law § 4; Divorce and Alimony § 2—absolute divorce action
—time for demanding jury trial

Defendant's request for a jury trial should be governed by former G.S. 50-10, in effect at the time the action was commenced, providing that request be made "prior to the call of the action for trial" rather than by Rule 38 of the Rules of Civil Procedure, providing that request be made "not later than ten days after the

Laws v. Laws

service of the last pleading"; therefore, defendant is entitled to trial by jury where she made her request on 12 December 1973 and the cause was tried on 13 December 1973.

APPEAL by defendant from *Harris, (A. Max)*, District Court Judge, 24 December 1973 Session of District Court held in GASTON County.

On 21 October 1969, plaintiff Wesley Laws, Jr., filed an action for absolute divorce from his wife defendant Thelma P. Laws, alleging he and defendant had been separated for one year. In her answer, filed on 21 November 1969, defendant plead abandonment as a bar to plaintiff's action. In January 1972, the case was placed on the inactive docket where it remained until October 1973, when it was again placed on the active calendar. The cause was tried on 13 December 1973. Defendant moved for a jury trial on 12 December 1973. Concluding that defendant waived her right to a jury trial by not filing a timely request, the court denied the motion.

After hearing the evidence, the court entered judgment for plaintiff.

Whitesides and Robinson by Henry M. Whitesides for plaintiff appellee.

Daniel J. Walton for defendant appellant.

VAUGHN, Judge.

Defendant contends that the court erred in denying defendant's motion for a jury trial.

In 1969, when this action was commenced, the parties, by virtue of G.S. 50-10, waived their right to a jury trial in absolute divorce actions based on a one-year separation unless a party filed "a request for a jury trial with the clerk of the court in which the action [was] pending, prior to the call of the action for trial." (Emphasis added.) As a result of an amendment, effective 11 May 1973, G.S. 50-10 now provides that "[t]he determination of whether there is to be a jury trial . . . shall be made in accordance with G.S. 1A-1, Rules 38 and 39." (Emphasis added.) G.S. 1A-1, Rule 38 requires a party to serve a demand for a jury trial upon the other party "at any time after the commencement of the action and not later than 10 days after the service of the last pleading. . . ."

State v. Livingston

In *Branch v. Branch*, 282 N.C. 133, 191 S.E. 2d 671, the Supreme Court was confronted with a case somewhat similar to this one. There, the issue was the effect of a 1971 amendment to G.S. 50-10 which provided that the right to a jury trial in actions for divorce after a one-year separation was not preserved unless one of the parties filed "a demand for a jury trial with the clerk of court in which the action is pending, as provided in the *Rules of Civil Procedure*." (Emphasis added.) The Court held, in effect, that the 1971 amendment to G.S. 50-10 did not alter the procedure for securing a jury trial in actions for absolute divorce after a one-year separation where an answer had been filed at least 10 days prior to the effective date of the amendment. The court said "on and after 19 February, 1971, the effective date of the 1971 amendment, it was impossible for defendant to demand a jury trial 'as provided in the Rules of Civil Procedure.'"

The substance of the 1973 amendment to G.S. 50-10 is very similar to that of the 1971 amendment, and the defendant in this case like the defendant in *Branch* filed an answer more than 10 days before the effective date of the amendment involved. For the reasons stated in *Branch*, the judgment is reversed and the case is remanded for trial by jury.

Reversed and remanded.

Judges MORRIS and BAILEY concur.

STATE OF NORTH CAROLINA v. JOHN D. LIVINGSTON

No. 7412SC545

(Filed 3 July 1974)

Automobiles § 127—drunken driving—sufficiency of evidence—failure to state defendant's faculties "appreciably" impaired

The State's evidence was sufficient for the jury in a prosecution for drunken driving where an officer testified he saw defendant operating an automobile partly on the sidewalk and partly in the street, that defendant had an odor of alcohol about him, that defendant's face was "real red," his eyes were bloodshot and his speech was slow and deliberate, that defendant walked unsteadily, and that in his opinion defendant had consumed enough of some type of intoxicating beverage to impair both his mental and physical faculties,

State v. Livingston

notwithstanding the officer did not state that defendant's physical or mental faculties were "appreciably" impaired.

APPEAL by defendant from *Canaday, Judge*, 19 December 1973 Session of Superior Court held in CUMBERLAND County.

Defendant was charged with driving under the influence of liquor in violation of G.S. 20-138.

Evidence for the State tended to show the following. At 1:45 a.m. on the morning of 2 March 1973, Patrolman R. E. Shambley of the Fayetteville Police Department saw defendant operating an automobile which was partly on the sidewalk and partly in the street. Upon stopping defendant, Shambley detected the odor of alcohol about him. Defendant's face was "real red," and his eyes were "bloodshot." When he walked, defendant "wasn't real steady . . . and [had] a tendency to sway. . . ." Shambley also testified that defendant's speech was "slow and deliberate." Defendant stated that he was not drunk. Shambley testified that in his opinion defendant "had consumed enough of some type of intoxicating beverage to impair both his mental and physical faculties."

Defendant offered no evidence.

Upon a verdict of guilty, defendant was sentenced to a prison term of 90 days.

Attorney General Robert Morgan by John R. Morgan, Associate Attorney, for the State.

Rose, Thorp and Rand by Anthony E. Rand and Cherry and Grimes by Sol G. Cherry, attorneys for defendant appellant.

VAUGHN, Judge.

The only issue on appeal is whether the court erred in denying defendant's motion for nonsuit. The thrust of defendant's argument is that since Officer Shambley did not state that defendant's physical or mental faculties were "appreciably" impaired, see *State v. Carroll*, 226 N.C. 237, 37 S.E. 2d 688; *State v. Combs*, 13 N.C. App. 195, 185 S.E. 2d 8, the evidence was insufficient to take the case to the jury.

"An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking. *Boehm v. St. Louis Public Service Co.*, 368 S.W. 2d 361 (Mo.). How-

State v. Bell

ever, an odor, *standing alone*, is no evidence that he is under the influence of an intoxicant, *Baldwin v. Schipper*, 155 Colo. 197, 393 P. 2d 363, and the *mere* fact that one has had a drink will not support such a finding. *McCarty v. Purser*, 373 S.W. 2d 293 (Tex. Civ. App.). Notwithstanding, the '[f]act that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138.' *State v. Hewitt*, 263 N.C. 759, 140 S.E. 2d 241."

Atkins v. Moye, 277 N.C. 179, 176 S.E. 2d 789.

The evidence in the case before us was sufficient *prima facie* to show a violation of the statute and thus to allow the *jury* to decide whether there was an appreciable impairment.

No error.

Judges MORRIS and BAILEY concur.

STATE OF NORTH CAROLINA v. COY LEE BELL

No. 7426SC540

(Filed 3 July 1974)

**Burglary and Unlawful Breakings § 5—breaking into hardware store—
sufficiency of evidence**

In a prosecution for breaking and entering with intent to steal, evidence was sufficient to be submitted to the jury where it tended to show that defendant was first observed backing out of a broken window of a store, defendant ran but was soon caught, defendant was wearing gloves and a jacket which contained particles of glass like that of the store window when he was apprehended, and there were indications that several offices and a cash register had been ransacked.

ON *certiorari* to review the Order of *Chess, Judge*, at the 12 November 1973 Session of Superior Court held in MECKLENBURG County.

Defendant was indicted for breaking and entering with intent to steal.

State v. Bell

Evidence for the State tended to show that on 10 February 1973, defendant Coy Lee Bell was apprehended in the vicinity of Little Hardware Company in Charlotte. When first seen, defendant was backing out of a broken window at Little Hardware. At the time, defendant's head and shoulders were inside the building. Defendant ran but was caught within a short distance. Defendant was wearing gloves and a jacket. Charlotte police officers, responding to a burglar alarm, noticed broken glass on the inside of Little Hardware but no glass was observed outside the building. There were indications that several offices and a cash register at Little Hardware had been ransacked. An analysis of glass particles removed from defendant's clothing revealed they had the same refractive and density qualities as the glass found inside Little Hardware. There was evidence that the window where defendant was first seen was not broken on 9 February 1973. An officer of Little Hardware testified that defendant was not given permission to break the window and that defendant, contrary to his assertions, had never been employed by Little Hardware as a security guard. He also testified that there was no burglar alarm tape on the window which was broken and that the alarm must have been tripped when someone "walked through" a black light field well inside the store.

Defendant admitted being in the vicinity of Little Hardware but denied breaking or entering the building. He also admitted having been convicted of a number of other crimes.

Defendant was convicted of nonfelonious breaking or entering and sentenced to a prison term of two years.

Attorney General Robert Morgan by Conrad O. Pearson, Assistant Attorney General, for the State.

Charles V. Bell for defendant appellant.

VAUGHN, Judge.

Defendant's only assignment of error is that the court erred in denying his motion for nonsuit. Defendant contends there was no evidence from which the jury could infer that defendant "wrongfully broke or entered the building in question." This contention is without merit. The evidence was clearly sufficient to take the case to the jury.

State v. Peek

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. SHIRLEY PEEK

No. 7419SC541

(Filed 3 July 1974)

1. Criminal Law § 155.5—docketing appeal—extension of time

An order of the trial tribunal extending the time to serve the case on appeal does not have the effect of extending the time to docket the appeal.

2. Criminal Law § 155.5—record on appeal—failure to docket in apt time

For failure of defendant to docket the record on appeal within 90 days after the date of the judgment appealed from, defendant's appeal is dismissed.

3. Constitutional Law § 30—denial of free transcript to indigent—alternative devices available

The trial court did not err in failing to order that defendant, an indigent, be provided with a free transcript of the testimony presented at her first trial, since alternative devices that would fulfill the same functions were available to defendant.

APPEAL by defendant from *Winner, Judge*, 7 January 1974 Session of Superior Court held in CABARRUS County.

By warrant proper in form, defendant was charged with making a false report concerning a destructive device, a violation of G.S. 14-69.1. She was found guilty in district court and appealed to superior court where she was tried *de novo* during the week of 12 November 1973. The jury was unable to agree upon a verdict and on 16 November 1973, the presiding judge withdrew a juror and declared a mistrial.

The case was called for retrial at the 7 January 1974 session. Defendant pleaded not guilty, a jury found her guilty as charged, and from judgment imposing prison sentence of 30 days, she appealed.

State v. Peek

Attorney General Robert Morgan, by Associate Attorney Jerry J. Rutledge, for the State.

Grant & Grant, by Phillip G. Carroll, for defendant appellant.

BRITT, Judge.

The judgment appealed from was entered on 11 January 1974 but the record on appeal was not docketed in this court until 10 May 1974. Rule 5 of the Rules of Practice in the Court of Appeals of North Carolina requires that the record on appeal be docketed within 90 days after the date of the judgment appealed from, unless the trial tribunal, for good cause, extends the time for docketing for not more than 60 days.

[1] Very soon after this court became operational, it held that an order of the trial tribunal extending the time to serve the case on appeal does not have the effect of extending the time to docket the appeal. *Smith v. Starnes*, 1 N.C. App. 192, 160 S.E. 2d 547 (1968). The court has restated the principle in many cases including the following: *State v. Brigman*, 8 N.C. App. 316, 174 S.E. 2d 48 (1970); *State v. Fulk*, 7 N.C. App. 68, 171 S.E. 2d 81 (1969); *Reece v. Reece*, 6 N.C. App. 606, 170 S.E. 2d 546 (1969); *Ross v. Sampson*, 4 N.C. App. 270, 166 S.E. 2d 499 (1969); and *State v. Farrell*, 3 N.C. App. 196, 164 S.E. 2d 388 (1968).

[2] For failure of defendant to comply with the rules of this court, the appeal is dismissed.

[3] Nevertheless, we have considered the questions raised in defendant's brief but find them to be without merit. The principal question is whether the trial court erred in not ordering that defendant, an indigent, be provided with a free transcript of the testimony presented at her first trial. We find that alternative devices that would fulfill the same functions as a transcript were available to defendant, therefore, the trial court did not err in denying defendant's request. *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed. 2d 400 (1971); *State v. Miller*, 15 N.C. App. 610, 190 S.E. 2d 722 (1972), cert. den. 282 N.C. 154, 191 S.E. 2d 603 (1972), and 282 N.C. 429, 193 S.E. 2d 744 (1972).

Appeal dismissed.

Judges CAMPBELL and PARKER concur.

State v. Stone

STATE OF NORTH CAROLINA v. GEORGE W. STONE

No. 746SC510

(Filed 3 July 1974)

1. Escape § 1—second escape—felony-escapes during different sentences

The escape statute, G.S.148-45, declares a second escape a felony even though defendant was serving different sentences when the two escapes occurred.

2. Escape § 1—felonious escape—failure to charge on misdemeanor

In a prosecution for felonious escape, the trial court did not err in failing to charge the jury that they could find defendant guilty of misdemeanor escape where all the evidence tended to show that this was defendant's second offense of escape.

APPEAL by defendant from *Peel, Judge*, 28 January 1974 Session of Superior Court held in HALIFAX County.

Defendant is charged in bill of indictment, proper in form, with felonious escape from the lawful custody of the State prison system, this being his second escape. He pleaded not guilty, and a jury found him guilty as charged. The court entered judgment imposing prison sentence of six months, the first three months to run concurrently with sentence then being served and the remaining three months to run at expiration of any and all sentences being served. Defendant appealed.

Attorney General Robert Morgan, by Associate Attorney Robert P. Gruber, for the State.

Allsbrook, Benton, Knott, Allsbrook & Cranford, by Dwight L. Cranford, for defendant appellant.

BRITT, Judge.

[1] Defendant states the first question presented by this appeal as follows: "Does the escape statute contemplate that a second escape is a felony, even though the first escape came at a time when the prisoner was serving another sentence?" We hold that it does.

G.S. 148-45 provides in pertinent part: "... Any prisoner convicted of escaping or attempting to escape from the State prison system who at any time subsequent to such conviction escapes or attempts to escape therefrom shall be guilty of a

State v. Cook

felony and, upon conviction thereof, shall be punished by imprisonment for not less than six months nor more than three years”

Suffice it to say, the form of the quoted statute could be improved upon. Nevertheless, we believe it was the intent of the General Assembly to declare a second offense of escape, or attempted escape, a felony regardless of the time elapsing or events occurring between the two offenses.

[2] Defendant contends the court erred in failing to charge the jury that they could return a verdict of guilty of misdemeanor escape. This contention is also without merit.

It is well settled in this jurisdiction that it is not error for the trial court to fail to charge on a lesser included offense unless there is evidence to support the lesser offense. *State v. Stevenson*, 3 N.C. App. 46, 164 S.E. 2d 24 (1968); *State v. McLean*, 2 N.C. App. 460, 163 S.E. 2d 125 (1968). In the trial of the case at hand all of the evidence tended to show that this was defendant's second offense of escape or attempted escape and there was no evidence to show only a first offense.

No error.

Judges MORRIS and BAILEY concur.

STATE OF NORTH CAROLINA v. FRANK SAMUEL COOK

No. 7427SC426

(Filed 3 July 1974)

Criminal Law §§ 142, 148—prayer for judgment continued—no appeal

Prayer for judgment may be continued from session to session without defendant's consent if no conditions are imposed, and when prayer for judgment is continued there is no judgment and no appeal will lie.

APPEAL by defendant from *Snepp, Judge*, 7 January 1974 Regular Criminal Session of Superior Court held in LINCOLN County.

By separate warrants issued from district court on 12 November 1973, defendant was charged with operating a motor

State v. Cook

vehicle on a public highway in North Carolina (1) while under the influence of intoxicants, seventh offense, (2) while his operator's license was permanently revoked, and (3) with an expired license plate. In district court, he was found guilty of all charges and appealed to superior court.

In superior court, on pleas of not guilty, defendant was found guilty of (1) driving under the influence of intoxicants, third offense, (2) driving after his license had been permanently revoked, and (3) driving with expired license plate. From judgments imposing prison sentences, he appealed.

Attorney General Robert Morgan, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin, for the State.

Wilson & Lafferty, P.A., by John O. Lafferty, Jr., for defendant appellant.

BRITT, Judge.

Defendant's sole assignment of error is that the court erred in entering the judgments. This assignment presents the case for review for error appearing on the face of the record. 3 Strong N. C. Index 2d, Criminal Law, § 161, page 112.

With respect to the charges of driving under the influence and driving after permanent revocation of operator's license, the record proper discloses no error. Therefore, the verdicts and judgments as to those charges are not disturbed.

With respect to the charge of driving with an expired license plate, the record reveals that in district court prayer for judgment was continued for twelve months. That case was not appealable from the district court to the superior court, nor from the superior court to this court.

It is well settled in this State that prayer for judgment may be continued from session to session without defendant's consent if no conditions are imposed; that when prayer for judgment is continued, there is no judgment and no appeal will lie. *State v. Pledger*, 257 N.C. 634, 127 S.E. 2d 337 (1962); *Barbour v. Scheidt, Comr. of Motor Vehicles*, 246 N.C. 169, 97 S.E. 2d 855 (1957).

For the reasons stated, as to the charge of driving with expired license plate, the verdict returned and judgment entered

State v. Richardson

in the superior court are vacated, and the case is remanded to the superior court with directions to remand the case to the district court.

In cases numbered 73CR6621 and 73CR6624, no error.

In case no. 73CR6625, judgment vacated and cause remanded.

Chief Judge BROCK and Judge BAILEY concur.

STATE OF NORTH CAROLINA v. WILLIAM HENRY RICHARDSON
AND CHARLES EDWARD REEDER

No. 7426SC537

(Filed 3 July 1974)

Criminal Law §§ 86, 162—cross-examination as to past offenses — untimely objection

Defendants' assignment of error to the trial court's allowing the solicitor to question one defendant concerning past criminal offenses cannot be sustained since a defendant's past offenses constitute a proper subject for cross-examination and since objections in this case were not timely in that they were not made until after defendant had answered the questions.

APPEAL from *Ervin, Judge*, 8 January 1974 Session of MECKLENBURG County Superior Court. Argued in the Court of Appeals 21 June 1974.

Defendants were tried and convicted of the armed robbery of the North Charlotte Pharmacy in the City of Charlotte. During the course of the trial, the solicitor was permitted to ask defendant Richardson whether he had committed certain crimes in the past. In each case, defendant Richardson responded in the negative, and his counsel objected after his answer. From the entry and signing of judgment, both defendants appealed.

Attorney General Morgan, by Assistant Attorney General Giles, for the State.

Plumides, Plumides, and Shuster, by John G. Plumides, for defendant appellant Richardson.

Robert F. Rush for defendant appellant Reeder.

State v. Richardson

MORRIS, Judge.

We cannot sustain defendants' assignment of error to the court's allowing the solicitor to question defendant Richardson concerning past criminal offenses. It is an elementary principle of evidence in North Carolina that an objection to a specific question must be made as soon as the question is asked and before the witness has time to answer. Stansbury, N. C. Evidence, Brandis Revision, Witnesses, § 27. An objection following the answer of a witness is timely only where the answer, rather than the question itself, indicates inadmissibility. *Id.* Counsel's objections are obviously to the questions, and they are not timely.

Even if the objections were timely, defendant would not be entitled to prevail on this assignment of error. As we stated in *State v. Willis*, 20 N.C. App. 43, 45-46, 200 S.E. 2d 408 (1973).

"The law regarding impeachment by reference to prior offenses was succinctly stated by the Supreme Court in *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). A witness—including a criminal defendant—may not for purposes of impeachment be cross-examined as to whether he has been accused—formally or informally—, arrested, indicted or whether he is under indictment for an offense other than the one for which he is on trial. The Supreme Court in the *Williams* decision overruled prior decisions on this point, but it specifically reaffirmed the rule that a witness—including a criminal defendant—is subject to cross-examination as to prior convictions.

In *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972), the Supreme Court elaborated on the rules established by *Williams*, *supra*, by holding that while a witness may not, for purposes of impeachment, be asked whether he has been accused, arrested, or indicted for a specific offense, he may nevertheless be asked whether he has committed specific criminal acts or has been guilty of specific reprehensible conduct. Accord, *State v. Lassiter*, 17 N.C. App. 35, 193 S.E. 2d 265 (1972)."

The questions asked defendant Richardson were proper under the rules established in the above cited cases. The record discloses nothing which would require a different result. Both defendants received a fair and impartial trial free from prejudicial error.

State v. White

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. PAUL WILLIAM WHITE

No. 741SC411

(Filed 3 July 1974)

APPEAL from *Martin, Perry, Judge*, 12 November 1973 Session of PASQUOTANK County Superior Court. Heard in the Court of Appeals 17 June 1973.

Defendant was charged in a valid bill of indictment with the common law robbery of Garry and Debbie Hooker. Through his court-appointed counsel defendant entered a plea of not guilty, and the following evidence was presented by the State.

Garry Hooker testified that defendant entered the Phillips 66 service station operated by Hooker and his wife and asked to use the restroom. When defendant emerged from the restroom, Hooker and his wife, Debbie, were standing beside the cash register. Defendant opened his coat, displayed a pistol shoved into his pants, and demanded the money from the cash register. Hooker handed defendant a Wachovia Bank bag containing \$265.

During the robbery, the station was well lighted and defendant was "at arm's length away" from the cash register. Hooker testified that he had occasion to observe defendant's clothing and his facial and physical characteristics.

Later, on the evening of the robbery, Hooker identified defendant after he had been apprehended by deputies. In court Hooker identified the robber as being defendant, Paul William White.

Hooker testified that as defendant left the scene of the robbery, he crossed the Knobbs Creek Bridge on foot. After the officers apprehended defendant, they searched the area of the bridge and found a blue Wachovia money bag and a four-inch plastic toy pistol. Also in that vicinity the officers discovered footprints which in their opinions were made by the

State v. LaRue

shoes worn by defendant at the time of his arrest. These shoes conformed to the description Hooker gave of the robber's foot-gear.

Defendant's motion for nonsuit was denied, and he elected not to offer evidence. The jury returned a verdict of guilty, and defendant appealed.

Attorney General Morgan, by Assistant Attorney General Webb, for the State.

Jennette, Morrison and Austin, by John S. Morrison, for defendant appellant.

MORRIS, Judge.

Defendant, having found no prejudicial error, presents the record for review by this Court. We have examined the record thoroughly, and have concluded that defendant was represented by competent counsel and that he received a fair and impartial trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. BRADY JACK LaRUE

No. 7423SC517

(Filed 3 July 1974)

APPEAL from *Rousseau, Judge*, 8 March 1974 Session of WILKES County Superior Court. Argued in the Court of Appeals 20 June 1974.

Defendant pled guilty to involuntary manslaughter at the 6 August 1973 Session of Wilkes County Superior Court and was given a sentence of four to seven years suspended for five years, and was placed on probation. It appears of record that one of the conditions of defendant's probation was that he "violate no penal law of any state or the Federal Government and be of general good behavior." On 2 November 1973, in Wilkes County District Court, he pled guilty to the crime of larceny.

State v. Rann

On 8 March 1973, after proper notice to defendant and a hearing at which defendant was represented by counsel, Judge Rousseau entered judgment revoking defendant's probation. Defendant was ordered to begin serving the four to seven year sentence previously imposed for involuntary manslaughter.

Attorney General Morgan, by Assistant Attorney General Lloyd, for the State.

Porter, Conner and Winslow, by Douglas L. Winslow, for defendant appellant.

MORRIS, Judge.

Defendant concedes that he is unable to find error in the proceedings in the Superior Court. After a thorough review of the record, we conclude that defendant was represented by competent counsel and that he received a fair and impartial hearing, free from prejudicial error.

No error.

Judges VAUGHN and BAILEY concur.

STATE OF NORTH CAROLINA v. GREGORY ANTON RANN

No. 7426SC460

(Filed 3 July 1974)

APPEAL by defendant from *Falls, Judge*, 14 January 1974 Session of Superior Court held in MECKLENBURG County.

Defendant was tried for second-degree murder on a charge contained in an information signed by the solicitor, defendant and his counsel having signed written waiver of indictment pursuant to G.S. 15-140.1. The State offered evidence tending to show: At about 8:30 p.m. on 22 September 1973, defendant, Jerry McMillan and several other youths went to the Red Ball Store on Graham Street in Charlotte, N. C., for the purpose of robbing the store. While they were standing behind the store sharing a newly purchased bottle of wine, Sim Graves, Jr. walked by the group. The defendant asked Graves about a gun, threatened him, and when Graves began running away, fatally

State v. Weeks

shot Graves in the head with a .22 pistol. Sharply disputing this narrative, the defendant offered evidence to the effect that the State's witness, McMillan, had shot Graves with a .22 pistol while the defendant was not present. The jury found defendant guilty of second-degree murder and judgment was entered thereon imposing 25 to 30 years prison sentence.

Attorney General Robert Morgan by Assistant Attorney General Walter E. Ricks III for the State.

Olive, Howard, Downer, Williams & Price by Paul J. Williams for defendant appellant.

PARKER, Judge.

Defendant has brought forward eight assignments of error, excepting to various portions of the trial court's instructions to the jury. We have diligently examined each and find none to be well taken. In no instance did the trial court either express an opinion, misstate the law, or confuse the jury. This hard-fought case presented the jury with two opposing factual situations. A murder had been committed; the question was, by whom. The jury chose to believe the State's evidence rather than the defendant's, and the record indicates that it did so after being fully apprised of the law and unaware of any judicial leaning.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. WAYNE KEITH WEEKS

No. 7418SC471

(Filed 3 July 1974)

APPEAL by defendant from *Kivett, Judge*, at the 12 November, 1973 Regular Criminal Session of GUILFORD Superior Court (Greensboro Division).

Heard in the Court of Appeals 20 June 1974.

Defendant was charged in a bill of indictment in proper form with the felony of armed robbery on 6 July 1973. The crime

State v. Snuggs

occurred in a place of business owned by Margaret Johnson on West Lee Street in the City of Greensboro, which was operated under the trade name "The Shoe String". Mabel M. May and Louise Parks were clerks in the store at the time. The defendant used a handgun to force the two clerks to open the cash register and give him the contents thereof, which amounted to nearly \$300. The defendant entered a plea of not guilty. The jury found him guilty of the offense charged, and from the imposition of a sentence of imprisonment for not less than sixteen nor more than twenty-two years in the State Department of Corrections, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney John R. Morgan for the State.

Public Defender Wallace C. Harrelson for defendant appellant.

CAMPBELL, Judge.

This appeal presents only the face of the record for our review. We have carefully reviewed the record and find no prejudicial error.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. MARTHA JANE SNUGGS

No. 7419SC533

(Filed 3 July 1974)

APPEAL by defendant from *Lupton, Judge*, at 4 February 1974 Session of RANDOLPH Superior Court.

Heard in the Court of Appeals 21 June 1974.

Defendant was charged in a bill of indictment in proper form with the felony of murder. She was placed on trial for second-degree murder in the slaying of Rosada Coble on 11 November 1973. The defendant entered a plea of not guilty. The jury returned a verdict of guilty of second-degree murder, and

State v. Snuggs

from a sentence of not less than fourteen nor more than twenty years in the State Department of Corrections, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Norman L. Sloan for the State.

Bell, Ogburn & Redding by Deane F. Bell for defendant appellant.

CAMPBELL, Judge.

This appeal presents only the face of the record for our review. We have carefully reviewed the record and find no prejudicial error.

No error.

Judges BRITT and PARKER concur.

Ballance v. Wentz

JUNE MELODY BALLANCE, A MINOR v. DR. IRL J. WENTZ, DR. J. R. DINEEN AND NEW HANOVER MEMORIAL HOSPITAL, INC.

No. 745SC273

(Filed 17 July 1974)

1. Physicians and Surgeons § 17— treatment of arm fracture with traction — standard of care — sufficiency of evidence

In an action to recover damages for personal injuries suffered by plaintiff allegedly caused by the negligence of defendant doctors in treating her injury with traction, the trial court properly granted directed verdict for defendants where plaintiff offered no evidence as to what constitutes good orthopedic practice in the application, treatment, care, and supervision of traction, and thereby failed to establish the standard of care required of defendant doctors.

2. Physicians and Surgeons § 16— arm fracture — traction treatment — res ipsa loquitur inapplicable

Res ipsa loquitur was inapplicable in plaintiff's action to recover for defendants' alleged negligence in treating her arm fracture with traction.

Judge CARSON dissenting.

APPEAL by plaintiff from *Peel, Judge*, 4 September 1973 Session of Superior Court held in NEW HANOVER County. Heard in the Court of Appeals 19 April 1974.

This is a civil action instituted by Evelyn M. Ballance, guardian ad litem for plaintiff, June Melody Ballance, a minor, to recover damages for alleged personal injuries suffered by the minor and allegedly caused by the negligence of the defendants, Dr. Irl J. Wentz and Dr. J. R. Dineen, attending physicians, and also by the negligence of the agents of New Hanover Memorial Hospital, Inc.

On 5 March 1971, the plaintiff filed her complaint containing the following pertinent allegations:

“VII. That on or about October 15, 1969, the minor plaintiff, June Melody Ballance, suffered a fracture, with displacement, of her upper right arm and was admitted as an in-patient in the corporate defendant's hospital under the care and treatment of the defendants; that the fracture was treated by traction.

VIII. That on or about the 2nd day of November, 1969, while the minor plaintiff was still hospitalized at the hos-

Ballance v. Wentz

pital under the care and treatment of the defendants and their staffs and while the minor plaintiff's right arm was in traction, and after the fracture of the right arm had properly relocated and was properly healing, the traction apparatus broke or came loose causing the minor plaintiff to suffer a refracture with displacement of the right arm.

IX. That the defendants and their agents were careless and negligent in that:

(1) They failed to properly place the arm in traction and failed to install the traction so that it would not break or come loose from the arm;

(2) They failed to maintain proper care and supervision over the traction and the arm;

(3) They neglected to take necessary steps to correct defects in the traction after being warned that the traction was coming loose; and

(4) They taped the arm of the plaintiff to the traction in a negligent and careless manner.

X. That the joint and concurrent negligence of the defendants and their staffs was the proximate cause of the injury to the plaintiff as herein stated.

XI. That, as a result of the carelessness and negligence of the defendants and their agents, and, as a result of the arm falling from traction, surgery had to be performed on the plaintiff, leaving the plaintiff with a permanent and extremely noticeable scar, additional hospitalization and hospital and medical expenses were required, the plaintiff had to and will have to suffer severe pain which she would not otherwise have had to suffer, the plaintiff has and will suffer extreme embarrassment and mental anguish from the scar for the remainder of her life and her suffered damages are in the amount of \$45,000.00."

The defendants filed answers denying any negligence on their part.

At trial the plaintiff offered evidence which tended to establish the following:

On 15 October 1969, June Melody Ballance, the minor plaintiff, fell from a ladder and suffered an injury to her right arm

Ballance v. Wentz

and shoulder. The child was taken to the emergency room of New Hanover Memorial Hospital and was treated by defendant Dr. Irl J. Wentz, an orthopedic surgeon. Dr. Wentz admitted the child to the hospital upon diagnosing her injury as "a severe fracture with displacement upper shaft of the humerus, right shoulder," and by his own testimony treated the child in the following manner:

"After I rendered my diagnosos (sic), I recommended that skeletal traction be utilized by placing a steinmann pin through the ulna. That is, through the skin on one side and out the skin on the other side so that we could apply a traction bow instrument used to attach to a pin while it is through a bone. * * *

After this was done, she was put in a hospital bed, the traction was rigged. In other words, we attached a rope to the traction bow and the rope went through some pulleys and a weight was attached to the pin, to the rope leading from the pin. We also applied some other traction material to the forearm. This material is a sticky, porous type bandage that sticks very readily to the skin and is wrapped with an elastic bandage to help hold it in place. Through this traction bandage another rope is attached again to other pulleys and a much lesser amount of weight is attached simply to keep the arm upright. * * *

The patient remained in the skeletal traction from 15 October 1969, until 3 November 1969. During this period of time portable X-ray films were taken of plaintiff's arm to monitor the progress of the healing. Based on their reading of the X-ray films the doctors believed that the healing was progressing as expected; and on 29 October 1969, the patient and her parents were informed that the patient would be placed in a shoulder spica cast within the next few days.

On 2 November 1969 the skin traction on plaintiff's arm slipped off causing her arm to rotate from right to left with her right hand landing on her left shoulder. The minor plaintiff testified that the falling of the traction caused her severe pain. After the traction fell, Dr. Dineen, Dr. Wentz's partner, was notified of the incident and he instructed a nurse to reapply the traction. No X-rays were taken at that time. Plaintiff, plaintiff's mother, and Margaret Elwell, a patient who shared a semi-private room in the hospital with plaintiff, each testified

Ballance v. Wentz

that the patient had called to the attention of the doctors and nurses the fact that her traction was slipping. On one occasion prior to the slipping off of the traction, the traction was reinforced by placing tape over the bottom portion of the traction around the patient's elbow.

On 3 November 1969, the traction was removed, a spica cast was applied, and X-rays were taken which disclosed that "position on the fracture was unsatisfactory for healing." Upon making this discovery, Dr. Wentz recommended to plaintiff's parents that an open reduction procedure be performed; and this operation took place on 5 November 1969. Dr. Wentz testified that the operation disclosed that the fracture was firmly attached and healing but in an improper position. Dr. Wentz stated, "I found that there was good side-to-side healing and in order to change the fracture, I had to use sharp, orthopedic instruments. I carried out what is known as osteotomy, which by definition means 'cutting through bone.' The purpose of this was to alter the relationship of side-by-side positioning of the bone to end-to-end positioning of the bone."

Plaintiff countered Dr. Wentz's version of what happened by introducing into evidence a letter dictated by Dr. Wentz approximately one year after the surgery. This letter, in pertinent part, reads as follows:

"On or about 11-2-69, the skin traction portion became loosened, and slipped off. The arm was positioned on the bed for a time, and on the instruction of Dr. Dineen, my partner, the skin traction was reapplied. Dr. J. R. Dineen checked the traction on the following morning. She was not having any unusual amount of discomfort and therefore an additional X-ray film was not obtained during the period of the traction slipping off and being reapplied. I therefore went ahead with application of the shoulder spica cast and was, of course, surprised to see that a complete separation of this healing fracture had occurred, making it mandatory that some surgical treatment be instituted. She was therefore scheduled for surgery and open reduction with internal fixation, using a Rush intermedullary pin, was carried out on 11-5-69. Her postoperative course was uneventful, and she was dismissed four days later, on 11-9-69. In summary, I think that we cannot be certain as to when fracture position was lost. It could have occurred when the skin traction slipped off, particularly if she be-

Ballance v. Wentz

came frightened, and twisted her arm and shoulder in some way. The fracture could also have slipped off while in sitting position with arm to side for application of cast.' And my signature."

After introduction of this letter, Dr. Wentz testified:

"The terms that I used in this letter, including the term 'complete separation of this healing fracture,' I will repudiate at this time. I would not say that there was a complete separation. This was based on X-ray taken on November 3, 1969."

"Yes, I would also repudiate the statement, 'In summary, I think that we cannot be certain as to when fracture position was lost.'"

At the conclusion of the presentation of plaintiff's evidence, the defendants' motions for directed verdicts were allowed. From a judgment directing verdict for defendants, plaintiff appealed.

Chambliss, Paderick, Warrick & Johnson, P.A., by J. B. Chambliss for plaintiff appellant.

Poisson, Barnhill, Butler & Martin by M. V. Barnhill, Jr., for defendant appellees Wentz and Dineen.

Hogue, Hill, Jones, Nash & Lynch by William L. Hill II, for defendant appellee New Hanover Memorial Hospital, Inc.

HEDRICK, Judge.

The single question presented by this appeal is whether the trial court erred in granting defendants' motions for directed verdicts. Because of the involvement of multiple defendants in this suit, our consideration of the question must necessarily be two-pronged. We shall first discuss the alleged negligence of defendants, Drs. Wentz and Dineen, and conclude with a consideration of the defendant hospital's alleged negligence.

"A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill, and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and

Ballance v. Wentz

care of his patient. [Citations omitted.]” *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E. 2d 762 (1955).

Plaintiff does not contend that Drs. Wentz and Dineen do not possess the requisite knowledge and skill of others similarly situated; however, she does argue that the doctors did not exercise reasonable care and diligence in the application of their knowledge and skill and that they did not use their best judgment in the treatment and care of the minor plaintiff.

[1] The standard of care required of a physician or surgeon is a matter involving highly specialized knowledge with respect to which a layman can have no reliable information. For this reason, both the court and the jury must usually be dependent on expert testimony to establish the standard of care. *Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E. 2d 57 (1951). Herein lies the fatal flaw in plaintiff’s case against the defendant doctors. At no point in the record does there appear to be an attempt by plaintiff to establish what constitutes good orthopedic practice in the application, treatment, care, and supervision of the traction. Neither of plaintiff’s medical experts—Dr. Wentz and Dr. Dorman—testified as to the standard of care exercised by other orthopedic doctors in treating patients with similar problems. Thus, the plaintiff having failed to establish by expert testimony the standard of care to be exercised by the defendant doctors, it follows *a fortiori* that plaintiff has shown no negligence on defendants’ part.

[2] Furthermore, the plaintiff’s contention that the doctrine of *res ipsa loquitur* applies is without merit, because we do not view this case as one which is susceptible to the application of that doctrine. Although the use of the *res ipsa loquitur* doctrine in medical malpractice cases has been approved in several decisions of our Supreme Court, see *Mitchell v. Saunders*, 219 N.C. 178, 13 S.E. 2d 242 (1941); *Pendergraft v. Royster*, 203 N.C. 384, 166 S.E. 285 (1932), we feel the following statement by Justice Higgins in *Watson v. Clutts*, 262 N.C. 153, 136 S.E. 2d 617 (1964) is applicable to the case at bar:

“The decisions of this Court generally hold that liability in malpractice cases must be based on proof of actionable negligence. The doctrine [of] *res ipsa loquitur* cannot be relied on to supply deficiencies in proof.”

With regard to the hospital’s negligence, we are of the opinion that the plaintiff failed to establish any negligence on

Ballance v. Wentz

the part of the hospital. Again, also the doctrine of *res ipsa loquitur* has no application.

All parties have devoted a considerable portion of their briefs to arguing their respective contentions as to whether plaintiff's evidence tends to show that the slipping of the skeletal traction was a proximate cause of any additional injuries suffered by the minor plaintiff. Our decision holding that the evidence fails to disclose any negligence upon the part of any of the defendants with respect to the use of the skeletal traction in treating plaintiff's injuries makes it unnecessary for us to discuss this aspect of the case.

For the reasons stated, the judgment appealed from is

Affirmed.

Judge BRITT concurs.

Judge CARSON dissents.

Judge CARSON dissenting:

While the majority opinion correctly states the general proposition that the standard of care required of a physician or surgeon is a matter involving highly specialized knowledge with respect to which a layman can have no reliable information, and that the court and jury are usually dependent on expert testimony to establish the standard of care, there is a well recognized exception to the general rule which is more applicable to the facts in question. That is, where the lack of reasonable care and diligence in the treatment of the patient is so patent that only common knowledge and experience are required to understand and judge the action of the defendant. *Hawkins v. McCain*, 239 N.C. 160, 79 S.E. 2d 493 (1954); *Wilson v. Hospital*, 232 N.C. 362, 61 S.E. 2d 102 (1950). In those cases the jury is able to understand and apply the standard of the reasonable prudent man without the necessity of specialized medical knowledge.

The majority opinion cites the case of *Jackson v. Sanitarium* to support its position that expert testimony must be used to establish the standard of care. While the Jackson case discusses the general principle as applied by the majority, the actual hold-

Ballance v. Wentz

ing is to the contrary. In writing the majority opinion, Justice Barnhill held at pp. 226-227,

It is true it has been said that no verdict affirming malpractice can be rendered in any case without the support of medical opinion. If this doctrine is to be interpreted to mean that in no case can the failure of a physician or surgeon to exercise ordinary care in the treatment of his patient, or proximate cause, be established except by the testimony of expert witnesses, then it has been expressly rejected in this jurisdiction. (Citations omitted.)

Rightly interpreted and applied, the doctrine is sound. Opinion evidence must be founded on expert knowledge. Usually, what is the standard of care required of a physician or surgeon is one concerning highly specialized knowledge with respect to which a layman can have no reliable information. As to this, both the court and jury must be dependant on expert testimony. Ordinarily there can be no other guide. For that reason, in many instances proximate cause can be established only through the medium of expert testimony. *There are others, however, where non-expert jurors of ordinary intelligence may draw their own inferences from the facts and circumstances shown in evidence.* (Citations omitted.) (Emphasis added.)

Here, despite the plaintiff's complaint that the traction on her arm was slipping, it was allowed to give way completely and fall with sharp force. It does not take specialized medical knowledge to understand that traction, if applied, must be applied in such a manner that it does not fall. Occurrences of this nature are similar to those found in the case of *Norris v. Hospital*, 21 N.C. App. 623, 205 S.E. 2d 345 (1974), where the failure of the hospital to raise the bed railings at night for an elderly patient was held to present a jury question without expert testimony. I think that the negligence of the attending physicians and the hospital, through its agent, the nurse, was a jury question and should have been presented to the jury.

Since the majority opinion does not discuss the proximate cause aspect of this matter, I will not discuss it either. Suffice it to say that I believe that there was sufficient evidence of proximate cause to raise a question for the jury, and the directed verdict against the plaintiff should not have been entered.

Trust Co. v. Larson

FIRST CITIZENS BANK & TRUST COMPANY v. DR. JOHN D. LARSON; WILLIAM J. SKELDON; ROBERT A. SKELDON AND ROBERT J. POWELL, JR.

No. 7412SC461

(Filed 17 July 1974)

1. Registration § 1; Uniform Commercial Code § 33— holder of promissory note — no duty to record security agreement

The holder of a promissory note had no duty to record the security agreement in order to protect the collateral for accommodation endorsers of the note.

2. Uniform Commercial Code § 33— failure to record security agreement — impairment of collateral

Whether failure of the holder of a note to record the security agreement constitutes an unjustifiable impairment of collateral so as to discharge accommodation endorsers depends upon the facts of the particular case. G.S. 25-3-606.

3. Uniform Commercial Code § 33— failure to record security agreement — impairment of collateral

Failure of the holder of a promissory note to record the security agreement did not constitute an unjustifiable impairment of the collateral, and accommodation endorsers of the note remained bound to the holder pursuant to their endorsements after the collateral was sold by the trustee in bankruptcy of the debtor, where it appears that plaintiff was relying primarily on the endorsers and not the collateral, the endorsers were all interested in the loan, and the endorsers had knowledge of the financial situation of the maker.

4. Attorney and Client § 7— action on note — attorneys' fees provision — notice — letter after case heard but before judgment

In an action against endorsers of a promissory note to collect the balance due on the note, a letter sent by plaintiff's attorney to the endorsers after the court heard the case and indicated that judgment would be entered for plaintiff but some six months prior to the actual entry of judgment sufficiently complied with the requirement of G.S. 6-21.2(5) that notice be given of the holder's intention to enforce the attorneys' fees provision of the note.

ON *certiorari* to review the order of *Brewer, Judge*, entered at 18 September 1972 Mixed Session, Superior Court, CUMBERLAND County. Heard in the Court of Appeals 30 May 1974.

Plaintiff brought this action to collect from defendants as endorsers the balance due on a promissory note made by the Brownie Sandwich Shoppe, Inc., and dated 29 September 1970. In addition to interest, plaintiff asked for "reasonable attorneys' fees as provided by statute and by the note, in the amount of

Trust Co. v. Larson

\$1,055.32." As security for the payment of the note certain restaurant equipment was pledged as collateral.

Defendants answered admitting that they signed as accommodation endorsers a promissory note of the Brownie Sandwich Shoppe, Inc., in the sum of \$8,967.24 which note was secured by restaurant equipment and collateral inventory by separate security agreement. All other allegations were denied. As a defense, they alleged that the value of the collateral was at all times sufficient to satisfy the indebtedness alleged by plaintiff; that the plaintiff negligently failed to record or file the security agreement and negligently failed to perfect its lien and permitted the collateral to be taken and sold by the Trustee in Bankruptcy of the maker of the note, who received \$7,167.50 from the sale of the collateral which amount is being held for the benefit of creditors of the maker. Defendants further allege that plaintiff unjustifiably impaired and lost the collateral given it "for the promissory note on behalf of the defendants and thereby discharged them."

The matter was heard on two stipulations of facts—one filed 22 September 1972 and one filed 8 August 1973—as follows:

"STIPULATION OF FACTS (Filed September 22, 1972)"

The parties to this action do hereby stipulate as to the following facts:

On September 29, 1970, Brownie Sandwich Shoppes, Inc., executed its note to the plaintiff in the amount of \$8,967.24 in the form of Exhibit A to Complaint. The defendants subsequently endorsed the note as accommodation endorsers. All parties understood that the proceeds of the note would be used to acquire certain restaurant equipment and fixtures. All endorsers at all times believed and understood that such equipment was to constitute collateral security for the repayment of such note. The transaction was completed on or about October 20, 1970, and the plaintiff received a security agreement executed in proper form for recordation, covering the restaurant equipment and fixtures purchased by Brownie Sandwich Shoppes, Inc. said agreement being in the form of Exhibit I to the Answer of the defendants, Larson and Powell. On or about March 4, 1971, Brownie Sandwich Shoppes, Inc. was declared a bankrupt

Trust Co. v. Larson

pursuant to a voluntary petition executed on its behalf by its President, William J. Skeldon. The trustee in bankruptcy acquired title to the property covered by the unrecorded security agreement, free and clear of any lien. On or about June 25, 1971, the trustee in bankruptcy sold the collateral covered by the unrecorded security agreement for the sum of \$7,167.50. The plaintiff received the sum of \$345.30 on the claim it filed with the trustee in bankruptcy, which reduced the outstanding unpaid balance on the said note to \$6,690.19."

"STIPULATION OF FACTS (Filed August 8, 1973)"

THE PARTIES HERETO, THROUGH COUNSEL, stipulate and agree that the following are uncontroverted facts in this case:

1. That Robert J. Powell, Jr., was owner of a major portion of the restaurant equipment described on collateral inventory attached to security agreement; that the same was sold by him to Brownie Sandwich Shoppes, Inc. and he was paid therefor with the proceeds of the loan from First Citizens Bank and Trust Company which is the subject matter of this suit.
2. That Robert J. Powell, Jr., was landlord of Brownie Sandwich Shoppes, Inc., leasing to said corporation restaurant premises at 118 Old Street, Fayetteville, North Carolina.
3. That Dr. John D. Larson, Jr., was vice-president of Brownie Sandwich Shoppes, Inc. and was a director of said corporation.
4. That William J. Skeldon was president of Brownie Sandwich Shoppes, Inc. and was a director of said corporation.
5. That Robert A. Skeldon was secretary-treasurer of Brownie Sandwich Shoppes, Inc. and was a director of said corporation.
6. That Brownie Sandwich Shoppes, Inc. filed a voluntary petition in bankruptcy.
7. That with regard to the claim of plaintiff for attorneys' fees, no written notice was furnished in advance of suit as referred to in G.S. 6.21.2; that the case was tried by the

Trust Co. v. Larson

Court pursuant to a Stipulation of Facts; that after reviewing the facts stipulated and hearing the arguments of counsel, the Court advised counsel that it was going to enter judgment in favor of plaintiff but that it wished the record to show the additional stipulations contained in paragraphs 1 through 6 in this Stipulation dated the 20th day of July, 1973; that after the Court had stated it was going to rule in favor of plaintiff, counsel for defendant Robert J. Powell, Jr., notified counsel for plaintiff that he was going to move that the Court not allow attorneys' fees to counsel for plaintiff by reason of the failure to give notice required under G.S. 6.21.2; that thereafter, after the Court had heard the case and stated it was going to enter judgment for plaintiff but before the actual entry of judgment, counsel for plaintiff advised counsel for defendants by letter dated June 11, 1973, that the defendants could pay the outstanding balance due on the note in controversy without incurring the additional expense of reasonable attorneys' fees."

From the stipulated facts, the court concluded, as a matter of law, that plaintiff had no duty to defendants to file the security agreement in order to protect the collateral for the defendant endorsers and that the "non-filing did not discharge the endorsers and they remained bound to the plaintiff pursuant to their endorsements". The court further concluded as a matter of law "that the letter mailed by plaintiff's attorney to defendants' attorney on June 11, 1973, was a sufficient compliance with G.S. 6.21.2(5) and gave the defendants an opportunity to pay the balance of the note without incurring the additional expenses of paying reasonable attorneys' fees, and therefore entitles plaintiff to recover such attorneys' fees in this action."

The court entered judgment for plaintiff in the amount of \$6,690.19 with interest from 2 January 1971 until paid at the rate of 6% and attorneys' fees in the amount of \$600.00. Defendants appealed.

Anderson, Nimocks and Broadfoot, by Hal W. Broadfoot, for plaintiff appellee.

Cameron, Harrington and Shaw, by Orton J. Cameron, for defendant appellant Larson.

McCoy, Weaver, Wiggins, Cleveland and Raper, by Alfred E. Cleveland, for defendant appellant Powell.

Trust Co. v. Larson

MORRIS, Judge.

Both appellants bring forward and argue exception No. 1—whether the trial court erred in concluding, as a matter of law, plaintiff had no duty to defendants to file the security agreement to protect the collateral for defendant endorsers and that the failure to file did not discharge the endorsers and they remained bound to plaintiff pursuant to their endorsements.

The transaction giving rise to this action occurred subsequent to the effective date of the Uniform Commercial Code. We look, therefore, to its provisions for an answer to the questions raised.

Both counsel for plaintiff and defendants candidly state that they have been able to find no North Carolina cases on the question raised by both appeals. Nor have we been able to find a case exactly on point from any other jurisdiction. We go, then, to the Code itself.

G.S. 25-3-415 defines an accommodation party as “one who signs the instrument in any capacity for the purpose of lending his name to another party to it.”

G.S. 25-1-201 (29) provides: “‘Party,’ as distinct from ‘third party,’ means a person who has engaged in a transaction or made an agreement within this chapter.”

G.S. 25-3-606 contains the following: “(1) The holder discharges any party to the instrument to the extent that without such party’s consent the holder . . . (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.”

[1] We find nothing in the Code nor do we find any case law requiring the holder to file the security agreement. Nor do we find anything in the stipulated facts which would impel the bank to file the security agreement. We agree with the court’s conclusion that plaintiff had no duty to defendants to file the security agreement in order to protect the collateral for the defendant endorsers.

Unquestionably, under the N.I.L., (§§ 142 and 143) those acts which would discharge the instrument were not applicable to an accommodation endorser, nor was impairment of collateral one of those acts which would discharge a person secondarily liable. The impairment of collateral was generally available as a

Trust Co. v. Larson

defense to a surety. However, it has been said that the drafters of the Uniform Commercial Code were aware of the confusion which existed with respect to accommodation makers and have endeavored to make it clear that an accommodation party is always a surety, *Rose v. Homsey*, 347 Mass. 259, 197 N.E. 2d 603 (1964), where the court said (at p. 263, quoting from official comment 1 and citing G.L. c. 106, § 3-606 which is identical to our G.S. 25-3-606): "suretyship defenses . . . are not limited to parties who are "secondarily liable", but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, *including an accommodation maker* or acceptor known to the holder to be so."

[2, 3] Even though impairment of collateral by the holder would generally discharge the surety under the N.I.L. and even though the U.C.C. may have made that defense available to an accommodation endorser; nevertheless, we think the Code had added a requirement. The holder must have *unjustifiably* impaired the collateral. Since there is no absolute duty to file the security agreement, whether the mere failure to file would constitute an unjustifiable impairment of collateral must depend upon the facts of the particular case. Here the stipulated facts disclose that appellant Powell was the owner of a major portion of the restaurant equipment described in the security agreement, and that he sold the equipment to Brownie Sandwich Shoppe, Inc., and was paid therefor with the proceeds of the loan from plaintiff, the note for which he became endorser. Appellant Powell also owned the building in which Brownie Sandwich Shoppe, Inc., was located and leased the premises to the Shop. Appellant Larson was Vice-President of Brownie Sandwich Shoppe, Inc., and was a director of the corporation. Brownie Sandwich Shoppe, Inc. filed a voluntary petition in bankruptcy. The security agreement itself provided, among other things, that the debtor would pay the cost of filing or recording the security agreement "in all public offices wherever filing or recording is deemed by Secured Party to be necessary or desirable." It appears clear that the plaintiff was not relying on the collateral primarily but was relying on the endorsers, since the plaintiff, having retained the option of filing or not filing the security agreement, chose not to do so. Additionally, the endorsers were all interested in the loan, one appellant being the seller of the equipment and lessor of the building in which it was to be located, the others being officers and directors of the business using the equipment. With this close attachment to

Trust Co. v. Larson

the business, it seems inconceivable that they did not insist upon filing. There is, also, the added factor that the bankruptcy was a voluntary one indicating that the endorsers had knowledge of the financial situation of the maker. We perceive no unjustifiable impairment of the collateral. We are of the opinion that the court did not commit error when it adjudged that the "non-filing did not discharge the endorsers and they remained bound to the plaintiff pursuant to their endorsements."

[4] The second exception is preserved, assigned as error, and argued only by appellant Powell. Stipulation No. 7 in the stipulations dated 20 July 1973 and stipulation No. 11 in the stipulations dated 27 December 1973 are set out in the facts above. Although not the subject of a stipulation, the note did contain a provision for payment of reasonable attorneys' fees. Appellant Powell assigns as error the court's conclusion that "the letter mailed by plaintiff's attorney to defendants' attorneys on June 11, 1973, was sufficient compliance with G.S. 6-21.2(5) and gave the defendants an opportunity to pay the balance of the note without incurring the additional expenses of paying reasonable attorneys' fees, and therefore entitles plaintiff to recover such attorneys' fees in this action."

G.S. 6-21.2 contains provisions with respect to the payment of attorneys' fees if the note is collected by or through attorneys after maturity. The provision pertinent here is G.S. 6-21.2(5) which is: "The holder of . . . a note and chattel mortgage or other security agreement . . . which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall *after maturity of the obligation by default or otherwise*, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees. If such party shall pay the 'outstanding balance' in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions.

"Notwithstanding the foregoing, however, if debtor has defaulted or violated the terms of the security agreement and has refused, on demand, to surrender possession of the collateral

Trust Co. v. Larson

to the secured party as authorized by § 25-9-503, with the result that said secured party is required to institute an ancillary claim and delivery proceeding to secure possession of said collateral; no such written notice shall be required before enforcement of the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance.'" (Emphasis added.)

The statute sets no time limit. In *Binnings, Inc. v. Construction Co.*, 9 N.C. App. 569, 177 S.E. 2d 897 (1970), the facts were these: The note was executed on 20 January 1970, due and payable 30 January 1970 and contained a provision for collection of reasonable attorneys' fees. Action for collection of the note was begun on 4 March 1970, and plaintiff asked for principal, interest, costs and reasonable attorneys' fees. Defendants answered on 2 April 1970 and averred that plaintiff had not given the notice required by G.S. 6-21.2(5) that he intended to enforce the provisions of the note with respect to collection of attorneys' fees. On 2 April 1970, counsel for plaintiff mailed to defendants notice of their intention to enforce the provision. The matter was tried in June 1970, and from judgment awarding attorneys' fees, defendants appealed. This Court held that the notice was in time, since "The only requirement of the statute as to when notice is to be given is that it be given . . . 'after maturity of the obligation by default or otherwise . . .'" *Id.* at 572. Here notice was given 11 June 1973, and judgment was not entered until 28 December 1973. It is obvious that defendants had ample time within which to pay the note without incurring additional cost of attorneys' fees. This is particularly true here where the court had advised defendants of its intention to render judgment as it did. Still defendants did not make any effort to pay. We are of the opinion that the action of the court in awarding attorneys' fees did not constitute reversible error.

Affirmed.

Judges HEDRICK and BAILEY concur.

State v. Dais

STATE OF NORTH CAROLINA v. FRANKLIN W. DAIS

No. 748SC413

(Filed 17 July 1974)

1. Criminal Law § 101—conduct of prosecuting witness and father — effect on jury — mistrial properly denied

In a prosecution for assault with intent to commit rape and for felonious breaking and entering, the trial court did not err in denying defendant's motions for mistrial based on the allegedly prejudicial conduct of the prosecuting witness and her father where the evidence tended to show that the prosecuting witness began to cry and sob, the trial court granted a recess for the witness to regain her composure, during the recess the witness's father assaulted defendant while the judge and several jurors were present, and after the recess the judge told the jury about the entire incident, asked the jurors if they could render a fair and impartial verdict uninfluenced by the incident, had the jury polled, and removed the only juror who indicated that his verdict might be influenced.

2. Rape § 18— assault with intent to commit rape — instructions proper

Trial court's instruction on assault with intent to commit rape was not improper by reason of the fact that the words "at all events against her will and notwithstanding any resistance she may make" were omitted.

APPEAL by defendant from *Godwin, Special Judge*, 17 December 1973 Session of Superior Court held in WAYNE County.

Defendant Franklin W. Dais was indicted for assault with intent to commit rape and for felonious breaking and entering.

Evidence for the State tended to show the following. About 1:00 p.m. on 16 March 1973, defendant drove into the yard in front of a trailer occupied by Brenda Diane Griffin. When Griffin answered defendant's knock on the door, defendant asked whether she knew a Mr. Parker. After Griffin replied in the negative, defendant returned to his car, a green Rambler station wagon with a Goldsboro city tag on the front, and drove away. About 2:30 p.m. while doing household chores, Griffin heard bumping noises under the trailer. Shortly thereafter, when she "went to the back door to get [a] load [of clothes] off the line," defendant "jumped in" and "grabbed" her just after she had opened the door. Griffin attempted to run, and a scuffle ensued. Defendant repeatedly told Griffin "he was going to get" her. Although Griffin attempted to fend defendant off with her hands, as well as by pushing and kicking him, he continued to hold her around the waist and forced Griffin down the hall into

State v. Dais

a bedroom. Before defendant put his hand over her mouth, Griffin screamed several times. Defendant threw Griffin onto a bed, removed the dungarees she was wearing and "tore off" her underwear. Griffin continued to struggle, but defendant kept pushing her down. After lowering his trousers, defendant told Griffin that "he was going to kill [her] if he didn't do it." Although defendant straddled Griffin who was still struggling, he did not have sexual intercourse with her. Griffin heard her husband's truck drive up and began screaming louder. Defendant "jumped up and left." Mrs. Griffin's husband came in, saw defendant, chased him around the trailer and began fighting with him. Defendant escaped out the back door, shutting it on the husband's arm. Griffin denied giving defendant permission to enter the trailer or to touch her in any manner. After defendant left, Griffin noticed some scratches on her leg and back which were not present before the fight with defendant. Almost immediately after the attack, she was examined at a local hospital and given some medicine "to calm her down."

The State also offered evidence that on 16 March 1973, Faison Williams, a mechanic, was road testing an automobile and observed a green Rambler station wagon in front of the Griffin trailer. A man who looked something like defendant was in the yard. Later, while testing another vehicle, Williams noticed the same green Rambler parked on the side of the road about 100-150 yards from the trailer. The hood on the Rambler was "approximately half up." Williams was employed with Mr. Griffin and knew where he lived. After being informed of what Williams had seen, Mr. Griffin went home to investigate.

Henry Poole, an SBI agent investigating the alleged assault, testified that defendant had made a statement to the effect that "he . . . crawled under the trailer from the front steps to the back; that . . . at the back a girl opened the door;" that "he didn't know why but he jumped the girl and forced her back into the trailer;" that "while he was in the trailer the girl's husband came home and caught him in the trailer but that he ran out and got away and returned to his car, turned around and left the area."

Testifying in his own behalf, defendant admitted being at the Griffin trailer twice on the afternoon of 16 March 1973. Defendant also acknowledged that his car, a green Rambler station wagon, was parked on the side of the road that after-

State v. Dais

noon. He claimed he parked it there when the vehicle's temperature needle registered "hot." Defendant explained that he raised the hood, checked the radiator, waited for it to cool down, removed the radiator cap and determined that "the car . . . needed some water." Defendant left the "hood raised halfway up" and went back to the Griffin trailer in search of water. He saw a can halfway under the trailer and crawled under to retrieve it, intending to use it to carry water. After discovering that the can had a hole in it, defendant knocked on the back door of the trailer. When Griffin answered, she told defendant "to come in . . . 'maybe we can find something for you'" to put water in. Defendant described the ensuing events as follows:

"I went in the back door and I noticed immediately inside that wall and we turned left towards whatever portion of the house it was. We walked toward the front end of the trailer. I think it was the hall portion. Mrs. Griffin was about three steps in front of me.

At that point I had not come in physical contact in any way whatsoever with Mrs. Griffin. At that point Mrs. Griffin had said nothing to me about leaving her premises. When we got to the front portion of the hall she turned and asked me if I was the boy that had come earlier and I said 'Yes, ma'am' and she told me I was lying and I said 'No, ma'am'. At this point I did not have any physical contact with her whatsoever.

After she made that statement she laughed and said was it something there that I wanted or if it was her that I wanted. I said, 'No, ma'am' and headed back toward the back door. At this point I had had no physical contact with Mrs. Griffin of any kind whatsoever. As I was backing back I tripped and fell backwards on my bottom. At that point Mrs. Griffin did not say anything to me but I heard a sliding noise. It came from the rear and when I heard the noise I jumped up and I ran to the front door of the trailer trying to get out of it. I think I pushed Mrs. Griffin going to the front door but other than that I had no physical contact with her. This happened in the upper portion of the hallway."

Unable to open the front door, defendant ran towards the back door and in so doing "passed some guy, a male person." Defendant denied scuffling with the man before running out the back

State v. Dais

door. Defendant stated that he removed the Goldsboro city tag from his car after his visit to the Griffin trailer because the tag would not stay in place.

Several witnesses testified that defendant's general reputation in the community is good.

Upon a verdict of guilty of both offenses, defendant was sentenced to a prison term of 15 years for assault with intent to commit rape and to a term of 4 years for felonious breaking or entering. The sentences are consecutive.

Attorney General Robert Morgan by Thomas M. Ringer, Jr., Associate Attorney, for the State.

Herbert B. Hulse and George F. Taylor for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that the court erred in denying his motions for mistrial. The motions were precipitated by the following events. While her husband was testifying, Brenda Griffin began to cry and sob. To afford Griffin an opportunity to regain her composure or to leave the courtroom, the court declared a short recess. Before the recess was announced, Griffin's father, Walter Walston, came into the Bar, at the assistant solicitor's suggestion, sat down by Griffin and put his arm around Griffin. The court subsequently determined that Griffin would not soon regain her composure and declared a recess for lunch until two o'clock. As defendant and others were leaving the courtroom but while the judge and several of the jurors were still present, defendant was assaulted or "set upon" by Walston. Griffin eventually left the courtroom with her husband and left the vicinity of the courthouse in an ambulance. Several jurors saw the ambulance, and at least one saw Griffin leave in it.

After the noon recess, the judge told the jury about the physical attack on defendant and explained defendant's and the State's right to a fair and impartial trial upon evidence presented at trial. The court then made the following request of the jurors:

"Now, you will say when your name is called, please, either yes that you feel that you can and will render a fair and impartial verdict uninfluenced by the incident men-

State v. Dais

tioned, a verdict based entirely upon the evidence and in accordance with law or you will answer no if you will that the incident is likely to have any influence on your verdict in any respect. Poll the jury, please, ma'am."

All jurors indicated to the court that they could render a fair and impartial verdict notwithstanding the incidents.

The court discussed Griffin's departure from the courthouse with the jury. The court also mentioned Griffin's display of emotion prior to the recess. In an effort to determine whether the jurors could still function impartially, the court said,

" . . . I'm anxious to know what you have to say about that now, and I would broaden the question to include any, all and every incident that you may have observed or which may have come to your attention in any respect. I will inquire of you if you feel that notwithstanding any incidents that you have, may have observed, whether mentioned by the Court or otherwise is likely to have any influence on your verdict; if you still feel, all thirteen of you that you can and will return a fully fair and an impartial verdict, that is a verdict that is fair to the State, that is fair to the defendant, that is impartial in all respects, a verdict based upon the evidence and in accord with law. I want to know from you if you feel that you can do so notwithstanding any incident mentioned by the Court or that has otherwise come to your attention and I will ask those of you who feel that you can do so, that is that you can render a fully fair and impartial verdict based upon the evidence and in accord with law to hold up your hands, please, so that you may be counted. . . ."

The only juror who indicated the incidents might affect his verdict was removed. The alternate juror was substituted, and the court proceeded to ask the jury as it was then constituted if it could "firmly and sincerely say . . . that [it] can and will return a fair and impartial verdict both for the State and for the defendant . . . a verdict based entirely upon evidence. . . ." All the jurors responded affirmatively.

Defendant argues that "these incidents separately, and without question, in the aggregate, created conditions of bias and prejudice requiring a determination by the court, as a matter of law, that the proceedings could not continue with fairness to the defendant."

State v. Dais

Motions for mistrial precipitated by "misconduct affecting the jury are addressed to the discretion of the trial court." *State v. Sneed*, 274 N.C. 498, 164 S.E. 2d 190. See *State v. Shedd*, 274 N.C. 95, 161 S.E. 2d 477, quoting 2 McIntosh, N. C. Practice 2d, p. 67. Not every disruptive event occurring during the course of the trial requires the court automatically to declare a mistrial. See 46 A.L.R. 2d 942-63. Ordinarily, the manner in which a trial is conducted rests in the discretion of the court, "as long as defendant's rights are scrupulously afforded him." *State v. Perry*, 277 N.C. 174, 176 S.E. 2d 729. This principle applies to control by the court of the conduct of spectators during the course of trial. See *State v. Laxton*, 78 N.C. 564; 53 Am. Jur., "Trial," § 42, p. 55. A mistrial, however, must be ordered where it appears that such conduct undermined the jury's impartiality. See *State v. Shedd*, *supra*; *State v. Sneed*, *supra*; *State v. Moye*, 12 N.C. App. 178, 182 S.E. 2d 814; 53 Am. Jur. "Trial," § 42, p. 55. In the present case, the court carefully examined the jurors to ascertain whether the incidents in question would undermine their ability to render an impartial verdict based only upon evidence presented at trial. Compare *State v. Moye*, *supra*. The court dismissed the only juror who admitted the possibility of bias. The trial court also made it clear that the jury should not consider the incidents in reaching a verdict. The court promptly took steps to insure that the duration and impact of the disruptions were minimized. Court was recessed when Griffin did not immediately regain her composure. To reduce the risk of rumor and distortion, the court elected to inform the entire jury of the attack on defendant even though only a few of the jurors had witnessed it.

Defendant cites the decision in *State v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173, in support of his position that the court should have declared a mistrial. In *Canipe*, the possibility of prejudice arose as a result of comments made by the court during the selection of the jury. The comments were characterized as having "a logical tendency to implant in the minds of the trial jurors the convictions that the presiding judge believed that the prisoner had killed his wife in an atrocious manner, that the prisoner was guilty of murder in the first degree, and that the prisoner ought to suffer death for his crime." After the jury was impaneled, the court stated, "I do not have any idea that anybody could possibly believe that the court was comparing the Greenlease case and the case of the murder of the American soldiers with this case. . . [b]ut in order to be sure that the

State v. Dais

defendant has not been prejudiced because of those questions, I would like for you to let me know now if anyone on the jury got the impression that the court was comparing this case to any other case. The defendant is entitled to a jury with no prejudice. . . .” In essence the Supreme Court held that this procedure did not effectively insure defendant’s right to trial by the impartial jury. The Court observed that in order to be excused, jurors had to meet two conditions: (1) acknowledge in open court that their minds were biased against the defendant and (2) in substance, accuse the presiding judge of instilling the bias. We conclude that the decision in *Canipe* is not controlling on the issue of whether the court’s questioning of the jury was an appropriate means of evaluating the possibility of actual prejudice. The trial judge in the case at bar did not express any opinion as to the guilt of the accused. The possibility of improper influence did not result from comments by the judge but from the conduct of others. Thus, the jurors were not called upon to tell the judge that *his* conduct had prejudiced them. We are confident that the able and experienced trial judge did not rely entirely on the spoken words of the jurors as he exercised his discretion. He could make his own evaluation of the seriousness of the disturbances that took place at trial and judge the probable effect, if any, on the jury. We hold that no abuse of the judge’s discretion has been shown.

[2] Defendant contends that the court incorrectly stated the law with respect to assault with intent to commit rape. The judge charged as follows:

“In order for the State to be entitled to a verdict of guilty of assault with the intent to commit rape as charged in that bill of indictment the State must satisfy you from the evidence and beyond a reasonable doubt of two things: 1. That the defendant, Franklin W. Dais assaulted Brenda Diane Griffin; that is that he put his hands on her and drug her into a small bedroom in her house trailer and removed her clothing without her consent; 2. The State must also satisfy you that he intended to use whatever force might be necessary to have sexual intercourse with her notwithstanding any resistance that she might make.

* * *

Intent to commit rape is the intent to use whatever force might be necessary to have sexual intercourse, in this

Harrell v. City of Winston-Salem

case with Brenda Diane Griffin notwithstanding any resistance that she might make.”

Defendant seems to argue that it was error for the court to fail to say “at all events against her will and notwithstanding any resistance she may make.” We do not agree. If defendant “at any time during the assault, had an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense.” *State v. Hudson*, 280 N.C. 74, 185 S.E. 2d 189. The omission of the words “at all events against her will” did not constitute prejudicial error.

We have considered defendant’s other assignments of error and the same are overruled. Defendant, represented by able counsel, had a fair trial free of prejudicial error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

VICTOR H. HARRELL AND WIFE, KATHLEEN A. HARRELL v. THE CITY OF WINSTON-SALEM, JOHN T. ROBERTS, HOUSING CODE ADMINISTRATOR, A. E. SPEAS, SUPERINTENDENT OF INSPECTIONS AND HERMAN A. DISHER, HOUSING INSPECTIONS SUPERVISOR AND VICTOR H. HARRELL AND WIFE, KATHLEEN A. HARRELL v. THE CITY OF WINSTON-SALEM

Nos. 7421SC259 and 7421SC260

(Filed 17 July 1974)

Constitutional Law § 13; Municipal Corporations §§ 4, 29— housing code — dwellings unfit for human habitation — demolition without compensation

In an action against a city and members of its inspections department to recover damages for the wrongful taking of plaintiffs’ property based on an order that plaintiffs either repair or demolish certain frame dwellings declared unfit for human habitation and on the city’s demolition of certain other dwellings, defendants were entitled to summary judgment as a matter of law since (1) plaintiffs have not exhausted administrative remedies available to them, G.S. 160A-446, and (2) defendant city could properly take such action without the payment of compensation to plaintiffs.

APPEAL by plaintiffs from *Wood, Judge*, 22 October 1973 Session of Superior Court held in FORSYTH County. Argued in the Court of Appeals 8 May 1974.

Harrell v. City of Winston-Salem

These are civil actions, wherein the plaintiffs, Victor H. Harrell and his wife, Kathleen A. Harrell, seek to recover from defendants, damages for the alleged wrongful taking of their property and demolition costs (Count I) and damages for exposing the plaintiffs to public ridicule (Count II).

The complaint in case No. 7421SC260 was filed on 5 March 1973 against defendant City of Winston-Salem, while the complaint in case No. 7421SC259 was filed on 20 June 1973 against defendants City of Winston-Salem et al. Although some of the defendants named in case No. 7421SC259 were not named in case No. 7421SC260, the allegations and prayers for relief contained within the two complaints are essentially identical.

Plaintiffs own a number of frame dwellings in Winston-Salem and have engaged in a running feud with defendants for some time over the condition of these dwellings. The record discloses that after notice was given to plaintiffs and hearings were held, several of these dwellings were declared unfit for human habitation. Subsequently, the plaintiffs were ordered either to repair or to demolish the dwellings; however, these dwellings have neither been repaired or demolished. Other frame dwellings owned by plaintiffs were demolished by defendant after notice was given and hearings held and after plaintiffs had failed either to repair or to demolish the dwellings.

The circumstances which gave rise to the present suit may best be explained by the following chronology of events:

On 18 December 1969 and on 1 November 1971 the Board of Aldermen of the City of Winston-Salem confirmed orders calling for the demolition of certain dwellings owned by the plaintiffs. Subsequent to these dates, five dwellings were in fact demolished by the defendant City of Winston-Salem; and the cost of such demolition was taxed to the plaintiffs.

On 15 February 1973 a complaint and notice of hearing on several other dwellings owned by plaintiffs was issued by the Superintendent of Inspection for the City of Winston-Salem. On 28 February 1973 the hearing was conducted; and on 2 March 1973, an order was issued by the Housing Code Administrator of the City of Winston-Salem, giving the plaintiffs the opportunity to repair the dwellings within sixty (60) days so as to conform with the City of Winston-Salem's standards of habitation. This order was excepted to by plaintiffs; and on 12 March 1973, they

Harrell v. City of Winston-Salem

gave notice of appeal to the Zoning Board of Adjustment. In the interim between the order of 2 March 1973 and the plaintiffs' notice of appeal to the Zoning Board of Adjustment on 12 March 1973, the plaintiffs on 5 March 1973 filed the first of their two complaints (case No. 7421SC260).

With respect to the houses which had not been demolished when the first complaint was filed on 5 March 1973, the record discloses that on 5 April 1973 the Zoning Board of Adjustment heard the plaintiffs' appeal from the Superintendent of Inspections and thereafter the Board of Adjustment affirmed the order permitting repairs to be made within sixty (60) days.

On 21 May 1973 the Board of Aldermen of the City of Winston-Salem adopted an ordinance requiring that the plaintiffs demolish the dwellings in question prior to 21 June 1973 or the city would demolish them and the plaintiffs would have to bear the expense of demolition. On 20 June 1973 the plaintiffs filed their second complaint (case No. 7421SC259) and also filed in the Superior Court simultaneously with this complaint a petition for certiorari and a petition for a temporary restraining order.

On 20 June 1973, Judge McLelland entered an order granting plaintiffs' petition for a writ of certiorari to review the prior proceedings in this matter, and also entered an order enjoining the City of Winston-Salem and its agents, employees, and servants from carrying out the ordinance ordering the demolition of plaintiffs' houses. On 27 June 1973, the defendants filed a motion asking the court to vacate the temporary restraining order and writ of certiorari; and on 11 July 1973, Judge McLelland entered an order vacating the temporary restraining order and the writ of certiorari.

On 27 June 1973 the defendants also made a motion to dismiss case No. 7421SC259 "on the grounds that a previous proceeding between the same parties and for substantially the same cause has heretofore been filed in this Court" On 11 July 1973 an order was entered dismissing case No. 7421SC259 and in so ordering this dismissal, the court stated that plaintiffs would be granted leave to amend their complaint in case No. 7421SC260. Plaintiffs did not except to the entering of this order nor does the record disclose that they ever amended their complaint.

Harrell v. City of Winston-Salem

On 26 October 1973 Judge Wood, acting on defendants' motions for summary judgment filed in case No. 7421SC260 and case No. 7421SC259, said motions having been filed on 29 March 1973 and 18 July 1973 respectively, entered summary judgment in favor of defendants in both cases.

The plaintiffs appealed.

W. Warren Sparrow for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr., for defendant appellees.

HEDRICK, Judge.

While the summary judgment appealed from appears to apply to both cases filed by plaintiffs, it obviously does not apply to the case filed 20 June 1973, since that case was dismissed by the order of the Superior Court dated 11 July 1973; and the plaintiffs did not except to or appeal from that order, nor did the plaintiffs except to or appeal from the order vacating the writ of certiorari and the restraining order. Furthermore, when these cases were argued in the Court of Appeals, plaintiffs' counsel, in response to a question by the court, stated that the plaintiffs had abandoned their alleged claim for damages set out in Count II of their complaints. Our review on this appeal, therefore, is limited to the question of whether summary judgment for defendants was proper with respect to plaintiffs' claim for damages as set out in Count I of the complaint filed on 5 March 1973.

The following pertinent allegations appear in Count I of the complaint filed on 5 March 1973:

"5. From time to time defendant, purportedly acting under its housing code, has caused orders to issue whereby plaintiffs were required to demolish certain frame dwellings owned by them on portions of the property described below, all owned by plaintiffs:

- (a) 1026 North Trade Street
- (b) 1030 North Trade Street
- (c) 1036 North Trade Street
- (d) 204-06 10-1/2 Street
- (e) 205-07 10-1/2 Street
- (f) 210-12 10-1/2 Street

Harrell v. City of Winston-Salem

- (g) 216 10-1/2 Street
- (h) 217-19 10-1/2 Street
- (i) 218-20 10-1/2 Street
- (j) 226-28 10-1/2 Street
- (k) 1031-33 Oak Street

6. As a result of these orders and previous administrative determinations by defendant's inspection division, plaintiffs were precluded under threat of criminal prosecution from making any alterations or repairs on their property. Plaintiffs made repeated attempts to repair or improve their property but were never issued appropriate building permits. The city's decision to preclude repair of the premises described above was without justification or excuse and an unlawful exercise of police power.

7. In addition to orders referred to above, defendant DEMOLISHED five dwellings owned by plaintiffs:

- (a) 209-11 10-1/2 Street
- (b) 221 10-1/2 Street
- (c) 222-24 10-1/2 Street
- (d) 225 10-1/2 Street
- (e) 1037-39 Oak Street

Upon demolition, defendant charged plaintiffs \$1,554.53 for the destruction of their property. Plaintiffs are informed and believe and therefore allege that their demolition and resulting expense were unlawful acts by defendant, constituting a wrongful taking of their property without due process of law."

Defendant City of Winston-Salem in its answer alleged that it had followed the procedures prescribed by law in that in each instance the plaintiffs were given notice and a hearing and no demolition order was issued until the plaintiffs had been fully afforded procedural due process. Furthermore, the defendant denied its actions in demolishing some of the dwellings constituted a wrongful taking of property without due process of law.

In support of its motion for summary judgment, the defendant city filed an affidavit of A. E. Speas, Superintendent of Inspections, alleging that the defendant city had followed the prescribed statutory procedure in entering all of its orders relating to the demolition or repair of any of plaintiff's property.

Harrell v. City of Winston-Salem

The affidavit further discloses that the plaintiffs did not appeal from any order entered with respect to the houses which were eventually demolished; while, with respect to some of the houses which were ordered to be repaired or demolished, the plaintiffs had appealed to the Zoning Board of Adjustment. This latter appeal was heard and decided by the Zoning Board of Adjustment on 5 April 1973. The plaintiffs filed no affidavits in opposition to the motion for summary judgment.

G.S. 1A-1, Rule 56(e), Rules of Civil Procedure, provides in part:

“When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”

A careful examination of the pleadings filed in this case in conjunction with the affidavit filed by defendant in support of its motion for summary judgment, coupled with the absence of the filing of any counter-affidavits by plaintiffs, leads us to the conclusion that Judge Wood was correct in finding no genuine issue as to any material fact. See, *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970). Thus, we are left only to consider if the defendant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c), Rules of Civil Procedure.

G.S. 160A-441 et seq. was enacted for the purpose of insuring that minimum housing standards would be achieved in the cities and counties of this State. G.S. 160A-443 authorizes a public officer, as that term is defined in G.S. 160A-442(7), to enforce ordinances relating to unfit and unsafe dwellings by ordering the repair, alteration, or improvement of dwellings or the removal or demolition of such buildings. G.S. 160A-446 delineates the administrative remedies which are available to a property owner who is aggrieved by an order of a public officer. In the instant case, the record on its face reveals that the plaintiffs have not followed the proper review procedure as set forth in G.S. 160A-446, but rather have attempted to circumvent the established procedure by filing the cause of action now being considered. Plaintiffs must exhaust the ad-

Duke v. Insurance Co.

ministrative remedies available to them, and they cannot be allowed to undermine the prescribed statutory procedure set forth in G.S. 160A-446. See, *Snow v. Board of Architecture*, 273 N.C. 559, 160 S.E. 2d 719 (1968); *Sanford v. Oil Co.*, 244 N.C. 388, 93 S.E. 2d 560 (1956).

Furthermore, in *Horton v. Gullede*, 277 N.C. 353, 177 S.E. 2d 885 (1970), Justice Lake in discussing the propriety of the taking of property without just compensation stated:

"It is quite true that the police power of the State, which it may delegate to its municipal corporation, extends to the prohibition of a use of private property which may reasonably be deemed to threaten the public health, safety, or morals or the general welfare and that, when necessary to safeguard such public interest, it may be exercised, without payment of compensation to the owner, even though the property is thereby rendered substantially worthless."

Therefore, we determine that Judge Wood was correct in concluding as a matter of law that the defendants were entitled to summary judgment as to Count I of the Complaint filed on 5 March 1973.

The judgment appealed from is

Affirmed.

Judges BRITT and CARSON concur.

RAYMOND L. DUKE v. THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK (A NEW YORK CORPORATION)

No. 7410SC393

(Filed 17 July 1974)

1. Insurance § 6— construction of policy in favor of insured

Insurance contracts are construed in favor of the insured and against the insurer because insurance policies are drafted by the insurance company and because insurance contracts ordinarily are contracts of adhesion.

2. Insurance § 42— disability insurance— regular care of physician requirement

Clause in plaintiff's disability insurance policy that insured was entitled to benefits only if his disability required that he be under

Duke v. Insurance Co.

the regular care and attendance of a legally qualified physician did not require plaintiff to make regular visits to a physician when such visits would not improve his condition.

3. Insurance § 44— disability insurance— regular care of physician— instruction improper

Though an issue as to plaintiff's care by a physician was not an appropriate issue to be submitted to the jury, plaintiff consented to its submission and cannot object on appeal; however, defendant was entitled to a correct charge on that issue, and failure of the court to instruct that plaintiff was not required to be under the regular care of a physician unless regular medical care could have brought about an improvement in his condition constituted prejudicial error.

APPEAL by plaintiff from *Hobgood, Judge*, 1 October 1973 Session of Superior Court held in WAKE County.

Plaintiff brought this action to recover benefits under disability insurance policy issued to him by defendant in 1961. This policy provided in part as follows:

"1. If the Insured becomes totally disabled due to accident before age 65; and

"2. If the Company, in accordance with the Disability Insurance Provisions on page 2, has paid disability income benefits for [a period of 24 months]; and

"3. If at the end of such period the Insured is wholly and continuously disabled, directly and independently of all other causes, as the result of the same accidental bodily injuries which had caused his total disability due to accident, so that he can perform no duties pertaining to any occupation for remuneration or profit for which he is, or may be, reasonably qualified by education, training or experience, the Company will continue to pay disability income benefits during the further continuance of the disability . . . provided that:

(a) such disability requires the Insured to be under the regular care and attendance of a legally qualified physician. . . ."

Plaintiff was involved in a golf cart accident on 9 June 1967, and suffered injuries to his left knee. On 8 January 1968, he had an automobile accident which aggravated the knee injuries. He was treated by Dr. A. E. Harer, an orthopedic surgeon. On 30 May 1968, after other methods of treatment had

Duke v. Insurance Co.

proved unsuccessful, Dr. Harer performed a patellectomy (removal of the kneecap) on plaintiff's left knee. Plaintiff continued to see Dr. Harer until October 1969. After October 1969 plaintiff's knee condition became static, and he did not see Dr. Harer again, except on one occasion. As a result of his knee condition, plaintiff's left leg has atrophied, he walks with a limp, and his knee has a tendency to buckle.

Until 1967 plaintiff was employed by the Seaboard Coast Line Railroad as a fireman and engineer. In the course of his work he was frequently required to climb up and down ladders. After his knee was injured, he could no longer climb ladders, and on 22 November 1967, his employment by the railroad company was terminated. Plaintiff has not been able to obtain any other employment, and, according to the expert opinion of Dr. Harer, he is totally disabled from any occupation requiring substantial physical activity.

From 22 November 1967 until 12 April 1970 defendant paid plaintiff benefits of \$400.00 per month, as provided by the policy. Since 12 April 1970 defendant has made no payments.

Defendant did not contradict plaintiff's evidence that his knee condition became static after October 1969. However, defendant did offer evidence tending to show that plaintiff was able to engage in occupations which did not require him to climb ladders, stairs or inclines.

Defendant tendered to the court two issues for submission to the jury. Counsel for plaintiff stated to the court that these issues were appropriate. The issues were:

"1. During the period April 12, 1970 to September 12, 1972, was the plaintiff wholly and continuously disabled, directly and independent of all other causes as the result of accidental injuries so that he could perform no duties pertaining to any occupation for remuneration or profit for which he was, or might have been, reasonably qualified by education, training or experience?

"2. If so, did plaintiff's disability require him to be under the regular care and attendance of a legally qualified physician during the period from April 12, 1970 to September 12, 1972?"

Duke v. Insurance Co.

The jury answered the first issue yes and the second issue no. The court entered judgment for defendant, and plaintiff appealed.

Dixon and Hunt, by Daniel R. Dixon, and Blanchard, Tucker, Denson & Cline, by Charles F. Blanchard, for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by Michael E. Weddington and James D. Blount, Jr., for defendant appellee.

BALEY, Judge.

Plaintiff contends that the trial court erred in submitting the second issue to the jury. He argues that he should not have been required to continue seeing Dr. Harer after October 1969, since his knee condition had stabilized by that time and further medical treatment would not have been of benefit to him. Defendant does not contend that plaintiff could have benefited from further treatment, but simply argues that under the express terms of the policy plaintiff was required to continue to be under the regular care of a doctor as long as he received benefits.

[1] North Carolina law recognizes the rule that insurance contracts are construed in favor of the insured and against the insurer. There are two reasons for this rule. First, insurance policies are drafted by the insurance company. "Its attorneys, officers or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the Court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." *Jolley v. Insurance Co.*, 199 N.C. 269, 271, 154 S.E. 400, 401; *accord*, *White v. Mote*, 270 N.C. 544, 155 S.E. 2d 75; *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295; *Underwood v. Ins. Co.*, 185 N.C. 538, 117 S.E. 790. Second, insurance contracts ordinarily are contracts of adhesion. "They are unipartite. They are in the form of receipts from insurers to the insured, embodying covenants to compensate for losses described. They are signed by the insurer only. In general, the insured never sees the policy until after he contracts and pays his premium, and he then most frequently receives it from a distance, when it is too late for him to obtain explanations or modifications of the policy

Duke v. Insurance Co.

sent him. . . . Out of these circumstances the principle has grown up in the courts that these policies must be construed liberally in respect to the persons insured, and strictly with respect to the insurance company.' " *Barker v. Insurance Co.*, 241 N.C. 397, 400, 85 S.E. 2d 305, 307; see *Glenn v. Insurance Co.*, 220 N.C. 672, 18 S.E. 2d 113; *Duke v. Assurance Corp.*, 212 N.C. 682, 194 S.E. 91; *Thompson v. Accident Association*, 209 N.C. 678, 184 S.E. 695.

The courts of North Carolina have not had occasion to determine whether a clause in an insurance policy requiring regular medical treatment is applicable when such treatment would not improve the insured's condition. A large number of courts in other jurisdictions, however, have dealt with this problem. See Annot., 84 A.L.R. 2d 375 (1962). Five states hold that the provision must be construed literally and the insured must visit a doctor regularly, regardless of whether he derives any benefit from such visits. *Equitable Life Assurance Soc'y v. Burns*, 254 Ky. 487, 71 S.W. 2d 1009 (1934); *Bruzas v. Peerless Cas. Co.*, 111 Me. 308, 89 A. 199 (1913); *Lustenberger v. Boston Cas. Co.*, 300 Mass. 130, 14 N.E. 2d 148 (1938); *Benefit Ass'n of Ry. Employees v. Cason*, 346 S.W. 2d 670 (Tex. Civ. App. 1961); *Mills v. Inter-Ocean Cas. Co.*, 127 W.Va. 400, 33 S.E. 2d 90 (1945). But see *Shaw v. Commercial Ins. Co.*, ---- Mass. ----, ----, 270 N.E. 2d 817, 822 (1971). (The case of *Isaacson v. Wisconsin Cas. Ass'n*, 187 Wis. 25, 203 N.W. 918 (1925), cited by defendant, does not deal with a situation in which the insured's condition has stabilized so that he cannot benefit from further treatment.)

Thirteen jurisdictions hold that the provision requiring regular medical treatment applies only when regular medical treatment can benefit the insured. *Sullivan v. North Am. Accident Ins. Co.*, 150 A. 2d 467 (D.C. Mun. Ct. App. 1959); *Reserve Life Ins. Co. v. Poole*, 99 Ga. App. 83, 107 S.E. 2d 887 (1959); *Penrose v. Commercial Travelers Ins. Co.*, 75 Idaho 524, 275 P. 2d 969 (1954); *Commercial Cas. Ins. Co. v. Campfield*, 243 Ill. App. 453 (1927); *Brown v. Continental Cas. Co.*, 209 Kan. 632, 498 P. 2d 26 (1972); *Mathews v. Louisiana Indus. Life Ins. Co.*, 11 So. 2d 80 (La. App. 1942); *World Ins. Co. v. McKenzie*, 212 Miss. 809, 55 So. 2d 462 (1951); *Davidson v. First Am. Ins. Co.*, 129 Neb. 184, 261 N.W. 144 (1935); *Yager v. American Life Ins. Ass'n*, 44 N.J. Super. 575, 131 A. 2d 312 (1957); *Hunter v. Federal Cas. Co.*, 199 App. Div. 223,

Duke v. Insurance Co.

191 N.Y.S. 474 (1921); *National Life Ins. Co. v. Patrick*, 28 Ohio App. 267, 162 N.E. 680 (1927); *Massachusetts Bonding & Ins. Co. v. Springston*, 283 P. 2d 819 (Okla. 1955); *Music v. United Ins. Co. of America*, 59 Wash. 2d 765, 370 P. 2d 603 (1962). The Missouri cases are in conflict. *Compare Mutual Benefit Health & Accident Ass'n v. Cohen*, 194 F. 2d 232 (8th Cir.), cert. denied, 343 U.S. 965 (1952) (applying Missouri law), and *Prudence Life Ins. Co. v. Hoppe*, 49 Tenn. App. 151, 352 S.W. 2d 244 (1961) (applying Missouri law), with *Boillot v. Income Guar. Co.*, 231 Mo. App. 990, 83 S.W. 2d 219 (1935).

[2] It is clear that the majority rule is the better reasoned one, and more in line with the principles followed by the North Carolina courts in interpreting insurance contracts. The purposes of a clause requiring regular medical treatment are to protect the insurer against fraudulent disability claims submitted by healthy policyholders, and to compel a disabled claimant to minimize his damages by consulting a physician and regaining his health as quickly as possible. Neither of these purposes is served by requiring the insured to visit a doctor regularly when the doctor cannot help him. It would be entirely futile for the insured to see a doctor under those circumstances, and the courts are reluctant to require the performance of futile acts. As the Illinois court stated in the *Campfield* case, *supra* at 456: "[W]e are at a loss to understand why it should be necessary [for the insured] to do such a useless thing as to remain under the treatment of a doctor. No claim is made that his condition could, or might, have been improved by such treatment." In *Hodgson v. Mutual Benefit Health & Accident Ass'n*, 153 Kan. 511, 518, 112 P. 2d 121, 126 (1941), the court asked: "Suppose a policy holder is totally and permanently disabled through the loss of sight in both eyes—would any court require the weekly attendance of a physician in order to secure continuing benefits provided by the policy? Obviously not, and such situations are commented upon in many decisions."

[3] When properly construed, plaintiff's insurance policy does not require him to make regular visits to a physician when such visits would not improve his condition. The second issue, therefore, was not an appropriate issue to be submitted to the jury. However, as defendant points out, counsel for plaintiff consented to the submission of this issue. Having done so, he cannot object to the issue on appeal. *Baker v. Construction Corp.*, 255 N.C. 302, 121 S.E. 2d 731; *Brant v. Compton*, 16

Houser v. Insurance Co.

N.C. App. 184, 191 S.E. 2d 383, *cert. denied*, 282 N.C. 672, 196 S.E. 2d 809.

But even though plaintiff is bound by his consent to the submission of the second issue, he is entitled to a correct charge on that issue. In every case the court has the duty to instruct the jury correctly on all substantive features of the case. N.C.R. Civ. P. 51(a); *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E. 2d 387; *Clay v. Garner*, 16 N.C. App. 510, 192 S.E. 2d 672; *Braswell v. Purser* and *Purser v. Braswell*, 16 N.C. App. 14, 190 S.E. 2d 857, *aff'd*, 282 N.C. 388, 193 S.E. 2d 90. The court should have instructed the jury that plaintiff was not required to be under the regular care and attendance of a physician unless regular medical care could have brought about an improvement in his condition. The court's failure to give such an instruction constitutes prejudicial error.

Since there was error in the charge, there must be a new trial on all issues.

New trial.

Judges MORRIS and HEDRICK concur.

PAUL W. HOUSER v. GEORGIA LIFE & HEALTH INSURANCE
COMPANY, INC.

No. 7426SC456

(Filed 17 July 1974)

Contracts § 12; Insurance § 2— employment contract — payment of commission — construction

Provision of an employment contract between plaintiff and defendant hiring plaintiff as state manager in charge of recruiting agents should be construed to mean that when plaintiff's loss ratio rose above 50%, his commissions should be reduced by an amount equal to 5% of the commissions, not 5% of the premiums, since such construction was supported by examination of the contract as a whole and was consistent with the purpose of the provision.

APPEAL by defendant from *Godwin*, *Special Judge*, 7 January 1974 Session of Superior Court held in MECKLENBURG County.

Houser v. Insurance Co.

This is an action to recover commissions allegedly owed to plaintiff under a contract with defendant insurance company.

The parties stipulated to the facts. On or about 24 September 1965 plaintiff and defendant entered into a written contract. The contract included three documents entitled "General Agent's Agreement," "Commission Schedule" and "State Manager Addendum." The "General Agent's Agreement" contained twenty-three articles. Article I provided that plaintiff was to act as an agent for defendant for the purpose of selling insurance policies. Article XIV provided:

"In consideration of the services performed hereunder by the General Agent and his Sub-Agents, the General Agent shall be entitled to commissions provided for in the 'Schedule of Commissions,' Exhibit 1, which is attached and made a part of this agreement."

Article XVII provided:

"This contract may be terminated at the absolute discretion of either party hereto by the mailing of a written notice to the other party at least thirty (30) days before said termination shall become effective. . . .

"If this Agreement is terminated by the Company or the General Agent or by the death or total disability of the General Agent, the Company will pay to the General Agent or to his estate, as the case may require, renewal commissions as provided in the Schedule of Commissions with 20% of these renewal commissions being deducted as a service charge. . . ."

The "Commission Schedule" provided as follows:

"EXHIBIT I

Commission Schedule

Hospitalization Policies including all Guaranteed Renewable Policies and the Cancer Policy. (If other Policies are from time to time made available to the General Agent for sale, rates of commission thereon will be provided on additional exhibits hereto.)

Houser v. Insurance Co.

The following commissions to the General Agent will apply:

First Year Commissions
Monthly Policies

General Agent's commission is 100% of the first three months—50% of the balance of the first year.

Quarterly Policies

General Agent's commission is 100% of the initial quarterly payment—50% of the balance of the first year.

. . . .

Starting with the Second Year premium payments, the General Agent will receive 30%. In addition, the General Agent will retain 100% of any policy fee where applicable.

In the event the loss ratio on the business produced by the General Agent exceeds 50% on the basis of incurred losses to earned premiums, the commission scale will be reduced by 5% on both new and renewal business. Such reductions shall remain in effect until the aggregate loss ratio attains a figure of 50% or less."

Although plaintiff and defendant signed a "General Agent's Agreement," it was not intended that plaintiff should be an ordinary insurance agent, selling insurance policies to individual customers. Instead, he was to serve as defendant's "state manager" for North Carolina. In this position, he was in charge of recruiting and training new agents for defendant. The "State Manager Addendum" signed by the parties provided (emphasis in original):

"GEORGIA LIFE AND HEALTH INSURANCE COMPANY is hereby appointing PAUL W. HOUSER as State Manager for the STATE OF NORTH CAROLINA for the purpose of recruiting and training General Agents and Agents for the Company.

"The compensation to be received for these efforts will be derived from the contract that this Addendum is made a part of and attached hereto. . . .

Houser v. Insurance Co.

"It is also understood and agreed that the State Manager will devote his full time and efforts in the development of General Agents and Agents for Georgia Life and Health Insurance Company."

Plaintiff served as state manager for defendant from 1 October 1965 until 31 March 1968, and he recruited a number of agents for defendant. His compensation as state manager was based on the difference between his own contract with defendant and the contracts of the agents whom he recruited. Each agent recruited by plaintiff signed a "General Agent's Agreement" which was substantially similar to the one signed by plaintiff. Attached to the "General Agent's Agreement" was a "Commission Schedule" providing as follows:

"Commission Schedule

Hospitalization Policies including all Guaranteed Renewable Policies and the Cancer Policy. (If other Policies are from time to time made available to the General Agent for sale, rates of commission thereon will be provided on additional exhibits hereto.)

The following commissions to the General Agents will apply:

First Year Commission
Monthly Policies

General Agent's commission is 100% of the first three (3) months—35% of the balance of the first year.

Quarterly Policies

General Agent's commission is 100% of the initial quarterly payment—35% of the balance of the first year.

.

Starting with the Second Year premium payments, the General Agent will receive 25%. In addition, the General Agent will retain 100% of any policy fee where applicable.

In the event the loss ratio on the business produced by the General Agent exceeds 50% on the basis of incurred losses to earned premiums, the commission scale will be reduced by 5% on both new and renewal business. Such

Houser v. Insurance Co.

reductions shall remain in effect until the aggregate loss ratio attains a figure of 50% or less.”

When an agent recruited by plaintiff sold an insurance policy, and the policy was renewed for a second or subsequent year, the agent selling the policy received a commission equal to 25% of the premium paid, and plaintiff received a commission of 5%. (It should be noted that the only commissions at issue in this lawsuit are renewal commissions. There is no dispute as to the amount of first-year commissions owed to plaintiff.) Since plaintiff received a commission on each insurance policy sold by an agent he had recruited, he was encouraged to recruit as many agents as possible, and to recruit agents who would work diligently and sell large amounts of insurance.

Defendant paid plaintiff commissions at a rate of 5% until 31 March 1968. On that date defendant dismissed plaintiff from his employment as state manager and general agent. Thereafter, defendant paid plaintiff commissions at a rate of 4%.

In November 1969 the loss ratio on business produced by plaintiff reached a level in excess of 50%, and defendant stopped paying commissions to plaintiff. Since November 1969 the loss ratio has remained above 50%, and plaintiff has received no further commissions.

Plaintiff brought this action in the Superior Court of Mecklenburg County, alleging that he was entitled to receive commissions at a rate of 3.8% for the period from November 1969 through December 1972. Defendant denied that plaintiff was entitled to any commissions for this period. The Superior Court gave judgment for plaintiff, and defendant appealed.

Thomas D. Windsor for plaintiff appellee.

Jones, Hewson & Woolard, by Harry C. Hewson, for defendant appellant.

BALEY, Judge.

In this case it is necessary to interpret the provision of plaintiff's "Commission Schedule" which reads as follows:

“In the event the loss ratio on the business produced by the General Agent exceeds 50% on the basis of incurred losses to earned premiums, the commission scale will be reduced by 5% on both new and renewal business.”

Houser v. Insurance Co.

Plaintiff's loss ratio rose to a level above 50% in November 1969. Until that month, he had been receiving commissions from defendant at a rate of 4% of renewal premiums. Plaintiff contends that under this provision of the contract, defendant should have deducted from his commissions an amount equal to 5% of *the commissions*. In other words, his commissions should have been reduced by 5% of 4%—that is, by 0.2%—and defendant should have continued to pay him commissions at a rate of 3.8%.

Defendant contends that when plaintiff's loss ratio rose above 50%, his commissions were to be reduced by an amount equal to 5% of *the premiums*, not 5% of the commissions. Since plaintiff had been receiving commissions at a rate of 4% of the premiums, a deduction of 5% of the premiums would leave him with no commissions at all. Accordingly, defendant paid plaintiff no commissions after November 1969.

We hold that the correct interpretation of the contract is the interpretation proposed by plaintiff.

First, plaintiff's interpretation is supported by an examination of the contract as a whole. There are two penalty provisions in the contract between plaintiff and defendant. One of these is the provision quoted above, requiring a 5% reduction in commissions when plaintiff's loss ratio exceeds 50%. The other penalty provision is found in Article XVII of the "General Agent's Agreement." Article XVII provides that whenever the contract between the plaintiff and defendant is terminated by either party, plaintiff's commissions are to be reduced by 20%. In March 1968, when defendant dismissed plaintiff from his positions as state manager and general agent, this provision was put into operation. Prior to March 1968, plaintiff had been receiving commissions at a rate of 5% of renewal premiums. After March 1968, defendant continued to pay commissions to plaintiff, but at a rate of 4% rather than 5%. In other words, plaintiff's commissions were reduced by an amount equal to 20% of *the commissions*, not 20% of the premiums. This is the interpretation placed on one penalty provision of the contract by the defendant insurance company and accepted by the plaintiff. The parties having adopted this interpretation, the other penalty provision of the contract should be construed in the same way; it, too, should call for a reduction in plaintiff's compensation to be measured by a percentage of his commissions. *Preyer v. Parker*, 257 N.C. 440, 125 S.E. 2d 916; *Construction*

Gardner v. Insurance Co.

Co. v. Crain and Denbo, Inc., 256 N.C. 110, 123 S.E. 2d 590; 3 Corbin, Contracts, § 558. A contract should be interpreted as a whole, and similar provisions of the contract should be given similar effects. *Yates v. Brown*, 275 N.C. 634, 170 S.E. 2d 477; 3 Corbin, *supra*, § 549; *cf. Trust Co. v. Bass*, 265 N.C. 218, 143 S.E. 2d 689.

Second, plaintiff's proposed construction of the 5% penalty provision is consistent with the purpose of the provision. Defendant was interested in keeping its loss ratio as low as possible, and thus increasing its profits. To encourage its agents to sell insurance to persons in good health, defendant inserted into its agents' contracts a provision calling for a reduction in commissions if the agent's loss ratio rose above 50%. But plaintiff did not sell any insurance policies for defendant; it was the local agents whom plaintiff recruited and trained that sold insurance policies to individual policyholders. It does not seem reasonable that the parties contemplated that the state manager be deprived of all his commissions because local agents sold policies to poor insurance risks. A contract should be interpreted in accordance with its purpose. *Peaseley v. Coke Co.*, 282 N.C. 585, 194 S.E. 2d 133; *Bank v. Corbett*, 271 N.C. 444, 156 S.E. 2d 835; *Starling v. Taylor*, 1 N.C. App. 287, 161 S.E. 2d 204; 3 Corbin, *supra*, § 545.

The judgment of the Superior Court is

Affirmed.

Judges BRITT and MORRIS concur.

WILLIAM BRUCE GARDNER, ADMINISTRATOR OF THE ESTATE
OF CAROL GARDNER BATTON, DECEASED v. NATIONWIDE
LIFE INSURANCE COMPANY

No. 748SC380

(Filed 17 July 1974)

Descent and Distribution § 6; Insurance § 30— murder of insurance beneficiary — suicide of insured — payment of proceeds to slayer's mother

Where a life insurance policy designated the insured's wife as beneficiary and also designated classes of alternative beneficiaries, and the insured feloniously killed his wife and then committed suicide,

Gardner v. Insurance Co.

the designation of alternative beneficiaries by classes complied with the requirement of G.S. 31A-11(b) that "some person" be named as alternate beneficiary in order to avoid payment of the insurance proceeds to the estate of the decedent-beneficiary, and the payment of the proceeds to the slayer-insured's mother pursuant to the provisions of the policy did not contravene the principle codified in G.S. Ch. 31A barring the slayer from profiting from his own wrong.

APPEAL by defendant from *Lanier, Judge*, 14 January 1974 Session of Superior Court held in LENOIR County. Heard in the Court of Appeals on 22 April 1974.

This is a civil action wherein the plaintiff, William Bruce Gardner, administrator of the estate of Carol Gardner Batton, seeks to recover \$20,000 in life insurance proceeds from defendant, Nationwide Life Insurance Company. The sum plaintiff seeks to recover represents proceeds allegedly wrongfully paid by defendant to Lossie S. Batton, mother of the deceased insured (William Ennis Batton).

The uncontroverted facts of this case are as follows:

On 12 September 1971, William Ennis Batton shot and killed his wife, Carol Gardner Batton, and then committed suicide. William Batton was insured for benefits by defendant under a group insurance policy in the amount of \$20,000. Carol Batton was named as the beneficiary of the policy and the parties agree that the insurance policy premiums were paid and the policy was in full force and effect on the date of death of the insured.

Defendant, after having been notified that Mr. Batton killed his wife and then himself, paid \$20,000 to the mother of the insured. Such payment was made pursuant to a provision contained within the policy which provided that: "If there is not a designated Beneficiary surviving at the death of the Employee, payment will be made in a single sum at the option of the Company, to anyone or more of the first surviving class of the following classes of successive preference beneficiaries: the Employee's (1) spouse, (2) surviving children, (3) surviving parents, (4) surviving brothers and sisters, and (5) executors or administrators."

Subsequent to the payment of the sum of \$20,000 to the mother of the deceased-insured, the plaintiff instituted the present action. The plaintiff bottomed his complaint upon the allegation that such payment was in violation of Chapter 31-A

Gardner v. Insurance Co.

of the North Carolina General Statutes in that this payment allowed the slayer to profit from his own wrongdoing.

Further evidence disclosed that the defendant was aware of the circumstances surrounding the deaths of Carol Gardner and William Gardner prior to making the payment of the proceeds to William Gardner's mother.

Both parties moved for summary judgment and the trial judge, after reviewing the pleadings, memoranda of law, and interrogatories, entered summary judgment in favor of plaintiff. In so doing, the trial court made the following pertinent conclusions of law:

"4. That the defendant had ample notice of circumstances bringing payment of the insurance benefits within the provisions of Chapter 31A of the General Statutes of North Carolina.

5. That such action was contrary to the provisions of Chapter 31A of the General Statutes of North Carolina and the law of North Carolina.

6. That Chapter 31A of the General Statutes of North Carolina and *Parker v. Potter, supra*, preclude payment of life insurance benefits to the mother of the deceased, insured William Ennis Batton, after notice of the circumstances bringing it within provisions of Chapter 31A.

7. That to allow the insured's mother to receive the benefits of life insurance policy of the defendant would be directly in conflict with those rules set out in *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68 (1931), since to do so would allow someone claiming through the insured to benefit from his wrongful act and would therefore be contrary to public policy."

Defendant appealed from summary judgment for plaintiff.

Owens & Haigwood by Thomas D. Haigwood and James, Hite, Cavendish & Blount by Marvin K. Blount, Jr., for plaintiff appellee.

Jeffress, Hodges, Morris & Rochelle by A. H. Jeffress for defendant appellant.

Gardner v. Insurance Co.

HEDRICK, Judge.

This appeal presents but one question for our consideration: Who is entitled to the proceeds of a life insurance policy when the insured feloniously kills the named beneficiary, then commits suicide, and the insurance policy contains a section designating classes of alternative beneficiaries who are to receive the proceeds when the named beneficiary(ies) does not survive the insured? Determination of this issue is governed by G.S. 31A-11(b) which reads as follows: "If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer, *unless the policy names some person other than the slayer or his estate as alternative beneficiary.*" (emphasis added.)

Plaintiff, notwithstanding the fact that alternative beneficiaries were enumerated in the insurance policy, contends that the proceeds should be paid to the estate of the decedent-beneficiary because the alternative beneficiaries enumerated in the insurance policy are designated by classes by the express language of the policy, and as such do not comply with G.S. 31A-11(b)'s requirement that the alternative beneficiary must be some "person". Furthermore, the plaintiff attacks the payment of the proceeds to the slayer's mother as being contrary to the avowed policy of G.S. 31A, to wit: "that no person shall be allowed to profit by his own wrong."

Conversely, defendant asserts that plaintiff's interpretation of G.S. 31A is much too narrow and that it is unable to discern how the policy advocated by Chapter 31A will be undermined by awarding the proceeds to the mother of the slayer.

Our research discloses that since the enactment of G.S. 31A in 1961, no cases have been decided under the specific provision now before us. Both plaintiff and defendant found their arguments upon the decision of *Parker v. Potter*, 200 N.C. 348, 157 S.E. 68 (1931). Although *Parker* was decided thirty years prior to the enactment of G.S. 31A, we nevertheless believe it to be important to the determination of the question now before us.

In *Parker*, just as in the present case, the husband slew his wife and then committed suicide; however, *Parker* differs factually from the present case in that two insurance policies were involved. The opinion of the court in *Parker*, although not specifically so designated, consists of two separate determinations—one for each policy involved. The first policy concerns

Gardner v. Insurance Co.

the husband as the insured and the wife as the beneficiary. The administrator of the slayer-husband's estate claimed that the heirs of the slayer were entitled to the proceeds of the policy as the beneficiary did not survive the insured and no alternative beneficiary was named. The Supreme Court balked at this logic and determined that the proceeds were to be paid to the next of kin of the wife, because to hold otherwise would be to do harm to the maxim that no man should take advantage of his own wrong. Plaintiffs in the instant case point to this part of the *Parker* decision for support of their contention that the award of the proceeds by defendant to the slayer's mother was improper.

The second policy involved in *Parker* also named the slayer's wife as the beneficiary and then contained the following pertinent sections:

"Section 4. Applications—Applications must be made on forms prescribed by the Sovereign Commander, stating the amount desired and naming the beneficiary and relationship to applicant, which beneficiary or beneficiaries shall be his wife, children, adopted children, parents, brothers and sisters, or other blood relations, or persons dependent upon the member. If the beneficiary named is not one of said class of persons, the certificate shall be null and void.

"Section 5. Beneficiaries—The beneficiary or beneficiaries shall be designated in every beneficiary certificate issued and shall be only of the class named above. In the event of the death of all the beneficiaries designated before the death of the member, if no new designation has been made, the benefits shall be paid to the surviving widow and surviving children of the member, share and share alike, provided such widow shall not be entitled to any benefits if she shall have been divorced; *provided further*, that if there be no surviving widow, the surviving children, if any, shall be entitled to all of such benefits, and if there be no surviving children, then the surviving widow, if any, shall be entitled to the benefits; but if there be no surviving wife or children, such benefits shall be paid to the next living relation of the member in the order named in class of beneficiaries named in paragraph 4 above, and those of the half blood shall share equally with those of the full blood."

The named beneficiary not surviving the insured, the court decided that the above quoted sections of the insurance policy

Gardner v. Insurance Co.

controlled; and on this basis, the mother of the slayer was awarded the proceeds. In so doing the court stated, "If it be granted that Rebecca J. Groves [mother of the slayer] is in the class named in section four by reason of privity in blood with the insured, it does not follow that her status as beneficiary is not definitely fixed by the terms of the contract. Indeed, her interest is derived from the contract and is not affected by any asserted analogy between a devise and a contract of insurance." *Parker v. Potter, supra*, at p. 355. Defendant asserts that this portion of the *Parker* opinion is the part which is critical to the instant case.

Although again recognizing the fact that *Parker* was decided three decades prior to the enactment of G.S. 31A, still we are inclined to agree with the defendant that the court's decision as to the second insurance policy should serve as a guideline to our determination of the case *sub judice*. Clearly, by its action in awarding the proceeds of the second policy to the mother of the slayer, the Supreme Court in *Parker* manifested its belief that the payment of the proceeds to the mother of the slayer pursuant to the pertinent sections of the insurance policy would not frustrate the principle that one should not benefit by his own wrongdoing.

Similarly, we believe that allowing the slayer's mother in the instant case to receive the insurance proceeds pursuant to the applicable sections of the policy will not do violence to the legislature's codification in G.S. 31A of the general principle barring a wrongdoer from unjustly enriching himself by his wrongful act. The legislature specifically included in G.S. 31A-11(b) a proviso to deal with alternative beneficiaries, and we are of the view that the term "some person" contained within the proviso should not be narrowly construed as contended by plaintiff. The public policy sought to be fostered by the enactment of G.S. 31A is predicated upon the theory that the murderer *himself* will not profit by his own wrongdoing, however, this principle does not extend to those related to the slayer, when, as here, they are named in the insurance contract as alternative beneficiaries.

For the reasons stated, the judgment appealed from is

Reversed.

Judges BRITT and CARSON concur.

Sales & Service v. Williams

SAFETY EQUIPMENT SALES & SERVICE, INC. v. JAMES JAY WILLIAMS AND RODNEY HUDSON BOSWELL

No. 745DC302

(Filed 17 July 1974)

1. Contracts § 7; Master and Servant § 11— covenant not to compete — requisites for validity

A covenant in an employment contract providing that the employee will not engage in competition with his former employer upon termination of his employment, although unfavored in the law, will be held valid if (1) the contract is in writing, (2) the parties entered into the contract at the time of and as a part of the employment contract, (3) the contract is founded upon valuable considerations, (4) it is reasonable both as to time and territory, and (5) the contract is fair to both the employer and employee and not against public policy.

2. Contracts § 7; Master and Servant § 11— covenant not to compete — sufficiency of consideration

Covenants not to compete entered into by each of the defendants at the time they were employed by plaintiff were founded upon adequate consideration, especially since the contracts recited that plaintiff agreed to reward defendants economically for their efforts and also promised to train the defendants in certain processes and practices confidential to the plaintiff's business.

3. Contracts § 7; Master and Servant § 11— covenant not to compete — territorial and time restrictions — reasonableness

Covenants not to compete which included a territorial limitation of a 150 mile radius from plaintiff's business and a time limitation of two years were not too broad.

4. Contracts § 7; Master and Servant § 11— covenants not to compete — protection for employer

Findings of fact by the trial court that defendants by their employment with plaintiff had become familiar with the plaintiff's customer lists, that defendants were posing a substantial threat to plaintiff's business by calling upon plaintiff's customers, and that defendants had gained knowledge about plaintiff's methods of service, repair and care of firefighting equipment were sufficient to show the need for protection of the employer and to support covenants not to compete.

APPEAL by defendants from *Barefoot, Judge*, 3 September 1973 Session of District Court held in NEW HANOVER County. Heard in the Court of Appeals on 19 April 1974.

This is a civil action wherein the plaintiff, a North Carolina corporation, seeks to enjoin the defendants, James J. Williams and Rodney Hudson Boswell, (both of whom were former employees of the plaintiff) from competing with the plaintiff cor-

Sales & Service v. Williams

poration. This action was instituted pursuant to restrictive covenants contained in contracts executed between plaintiff corporation and defendants. A temporary restraining order was entered on 30 August 1973; and on 4 September 1973, a hearing was held to determine if the restraining order should be continued pending a final hearing. At this hearing the court made the following relevant findings of fact:

"2. That the plaintiff entered into a contract of employment with the defendant, James Jay Williams, on or about the 27th day of January, 1972, and with the defendant, Rodney Hudson Boswell, on or about the 9th day of June, 1969, the mutual covenants and promises of which furnished valuable consideration for said contracts, and each of them.

3. That under the terms of each said contracts (sic), the defendants, and each of them, agreed and covenanted with the plaintiff, that he, for himself or on behalf of any other person, persons, firm, partnership or corporation, for a period of two (2) years immediately following the termination of his employment with the plaintiff, within a radius of One Hundred Fifty (150) miles in all directions from Wilmington, North Carolina, would at no time, among other things, call upon any customer of the plaintiff for the purpose of soliciting or selling any welding supplies, CO₂ gas, fire extinguishers, safety equipment, welding equipment or for the purpose of repairing, servicing or recharging said equipment or directly or indirectly solicit, divert or take away any such customers.

4. That the defendants, James Jay Williams and Rodney Hudson Boswell, terminated their employment with the plaintiff on or about the 14th day of February, 1973 and on or about the 2nd day of March, 1973, respectively.

5. That the defendants gained knowledge of the methods of recharging, repairing and servicing fire fighting equipment, the customer lists of the plaintiff, the suppliers of the plaintiff and in general the engaging in the business of the sales and service of all types of fire fighting equipment, safety equipment and welding equipment, through their employment with the plaintiff.

6. That the defendants using the knowledge they gained through their employment with the plaintiff have been and

Sales & Service v. Williams

are presently, severally and jointly as Carolina Fire Control Equipment Company, engaged in calling upon customers of the plaintiff for the purpose of selling, servicing, repairing and recharging fire fighting equipment and soliciting, diverting and taking away the plaintiff's customers."

Based on the foregoing findings of fact, the trial court made the following conclusions of law :

"A. That the restrictions as to time and territory contained in the employment contracts entered by the defendants with the plaintiff are reasonable and there is probable cause for believing the plaintiff will be able to sustain his position at the trial on the merits in this action.

B. That unless a preliminary injunction is granted herein pending final determination of this action, there is a reasonable apprehension that the defendants who are actually engaged in soliciting, diverting and taking away the plaintiff's customers, will continue such acts to the irreparable injury of the plaintiff.

C. That the granting of a preliminary injunction herein pending the final determination of this action is necessary to maintaining the status quo and to protect the legitimate interest of the plaintiff."

Upon entry of this judgment confirming the restraining order, the defendants appealed.

Goldberg & Anderson by Frederick D. Anderson for plaintiff appellee.

Anderson & Hughes by John R. Hughes for defendant appellants.

HEDRICK, Judge.

[1] The defendants maintain that the restrictive covenants in their respective contracts are invalid and unenforceable and, therefore, that the trial court erred in continuing the restraining order against them. A covenant in an employment contract providing that the employee will not engage in competition with his former employer upon termination of his employment, although unfavored in the law, will be held valid if the following criteria are satisfied: (1) the contract is in writing; (2) the parties entered into the contract at the time of and as a part of

Sales & Service v. Williams

the employment contract; (3) the contract is founded upon valuable considerations; (4) it is reasonable both as to time and territory; (5) the contract is fair to both the employer and employee and not against public policy. *Asheville Associates v. Miller and Asheville Associates v. Berman*, 255 N.C. 400, 121 S.E. 2d 593 (1961); *Industries, Inc. v. Blair*, 10 N.C. App. 323, 178 S.E. 2d 781 (1971).

Defendants do not argue that the covenants enforced by the trial court in the instant case are not in writing; however, they do assert that the covenant fails with respect to the other factors enumerated above.

We first consider defendants' contention that the contracts are void and unenforceable for lack of consideration to support them. Defendants recognize the general rule that if restrictive covenants are contained in the initial employment contract then they are founded upon adequate legal consideration, as the mutual promises of employer and employee provide valuable considerations each to the other for the contract. *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E. 2d 166 (1963). However, defendants, relying upon *Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543 (1944), state that the requisite consideration was absent in this case due to the fact that the relationship of employer and employee antedated the existence of the restrictive covenants and that the subsequent covenants not to compete were not based upon new consideration, such as change in position or an increase in pay.

[2] Defendants' point would be well taken if the record revealed factual circumstances consistent with their argument, but a careful review of the record reveals that the written contracts of employment containing the covenants not to compete were entered into by each of the defendants at the time they were employed by the plaintiff. Furthermore, each of the contracts recites that the defendants were to receive valuable considerations from plaintiff in that plaintiff agreed to economically reward the defendants for their efforts and also promised to train the defendants in certain processes and practices confidential to the plaintiff's business. It is our view that the contracts meet the consideration requirement, and that this assignment of error is without merit.

[3] Next, we must pass upon defendants' contention that the terms of the restrictive covenants as to time and territory are

Sales & Service v. Williams

too broad. The defendants-employees argue that the territorial limitation (150 mile radius from Wilmington) and the time period restraint (two years) are on their face unreasonable. The record reveals that the plaintiff is engaged in business in an area encompassing a 175 mile radius of Wilmington; and, thus, the territorial limitation sought to be imposed does not cover an area in which the plaintiff is not engaged in business. See *Comfort Spring Corp. v. Burroughs*, 217 N.C. 658, 9 S.E. 2d 473 (1940). In fact, our Supreme Court has upheld the validity of restrictive covenants which contain limitations (time and territorial) as large or larger than the restrictive covenants in the present case. *Enterprises, Inc. v. Heim*, 276 N.C. 475, 173 S.E. 2d 316 (1970) (Nationwide restraint for two years); *Exterminating Co. v. Griffin* and *Exterminating Co. v. Jones*, 258 N.C. 179, 128 S.E. 2d 139 (1962) (greater than 150 miles for two year period); *Exterminating Co. v. Wilson*, 227 N.C. 96, 40 S.E. 2d 696 (1946) (thirteen county restraint for two years); *Studios v. Goldston*, 249 N.C. 117, 105 S.E. 2d 277 (1958) (74 county restraint in N. C., all of South Carolina, and eleven counties in Georgia for a period of two years).

Finally, an examination of (1) the need for protection of the employer and (2) the import of the restrictive covenants upon the public in general, reveals that the restrictive covenants are reasonable in their terms.

[4] The trial court in the present case found as a fact that defendants by their employment with plaintiff had become familiar with the plaintiff's customer lists and that the defendants were now posing a substantial threat to plaintiff's business by calling upon plaintiff's customers. Moreover, the trial court found as a fact that the defendants had gained knowledge about the plaintiff's methods of service, repair, and care of fire fighting equipment. These facts, which are supported by competent evidence and thus binding upon us on this appeal, are sufficient, all other things being equal, to support the covenants. See Annot. 9 A.L.R. 1456 and *Blake, Employee Agreements Not To Compete*, 73 Harvard Law Rev. 625 (1960).

Moreover, there has been no showing that the public will be harmed by the enforcement of these restrictive covenants. Although contracts restraining employment are not viewed favorably in modern law, *Kadis v. Britt, supra*, the courts continue to consider it "as much a matter of public concern to see that valid engagements are observed as it is to frustrate oppres-

Neal v. Booth

sive ones." *Sonotone Corp. v. Baldwin*, 227 N.C. 387, 42 S.E. 2d 352 (1947).

For the reasons herein stated, the judgment of the trial court continuing the restraining order pending a final hearing of this matter is

Affirmed.

Judges BRITT and CARSON concur.

EDNA H. NEAL, ADMINISTRATRIX OF THE ESTATE OF JERRY AUGUSTUS NEAL v. N. C. BOOTH AND SEABOARD COAST LINE RAILROAD COMPANY

No. 7411SC500

(Filed 17 July 1974)

1. Railroads § 6— crossing accident — negligence by railway and engineer

In a wrongful death action arising from a railway crossing accident, plaintiff's evidence was sufficient to establish negligence on the part of defendant railway and defendant engineer where it tended to show that the electrical warning signals at the crossing were not operating, that the engineer gave no warning by whistle, bell or otherwise of the train's approach, and that plaintiff's intestate's view of the approaching train was obstructed by the depot and by railroad cars on a service track in front of the depot.

2. Railroads § 5— crossing accident — contributory negligence by motorist

In a wrongful death action arising from a railway crossing accident, plaintiff's evidence that her intestate was traveling at the rate of 5 mph when the accident occurred and that his view of the track upon which the collision occurred was unobstructed when he was 21 feet from the track disclosed that the intestate was contributorily negligent as a matter of law.

APPEAL by plaintiff from *Hobgood, Judge*, 14 January 1974 Session of Superior Court held in JOHNSTON County. Heard in the Court of Appeals 31 May 1974.

This is a civil action wherein the plaintiff, Edna H. Neal, administratrix of the estate of Jerry Augustus Neal, seeks to recover damages for the wrongful death of plaintiff's intestate resulting from an automobile-train collision in the town of Kenly, N. C., on 15 November 1969.

Neal v. Booth

Plaintiff in her complaint filed on 11 February 1971, alleged, among other things, that defendants were negligent in the following respects: (1) in failing to have a crossbar across N. C. Highway 222 to prevent a vehicle from crossing the railroad tracks when a train was approaching; (2) in maintaining a railroad station between Railroad Avenue and defendant Seaboard's railroad tracks in such a fashion as to obstruct the plaintiff's intestate's view of trains approaching from the east; (3) in negligently operating train No. 85 by failing to keep a proper lookout, by traveling at an excessive rate of speed and without giving any warning of the train's approach to the intersection.

Defendants, among other things, alleged that plaintiff's intestate was negligent in that he failed to keep a proper lookout and drove upon the crossing without taking reasonable precautions to discover the danger and avoid the accident.

At trial the plaintiff offered evidence tending to establish the following:

Three railroad tracks of the defendant Seaboard Coast Line Railroad Company (Seaboard) intersect with highway #222 in Kenly. The railroad tracks run generally in an east-west direction; while highway #222, which is also the main street of Kenly, runs in a north-south direction. In the north-east corner of the railroad crossing, there is a railroad station maintained by the defendant Seaboard. The station is bordered on the north side by North Railroad Street which runs parallel to the railroad tracks in an east-west direction.

On 15 November 1969, at approximately 4:30 p.m., Jerry A. Neal was driving his automobile on North Railroad Street and was headed in a westerly direction parallel with the railroad tracks; however, plaintiff's intestate's view of the railroad tracks was impeded by the presence of the depot to his immediate left. Neal came to a stop at the intersection of highway #222 and Railroad Street and then turned left onto Highway #222. He proceeded across the railroad crossing at five miles an hour. Because of the presence of the railroad station and because of the boxcars on the service track (the first track plaintiff's intestate crossed), Neal would not have been able to see train traffic approaching from the east until he was 21 feet from the southernmost track. Neal's automobile was struck by defendant Seaboard's train No. 85, which was being operated

Neal v. Booth

by defendant N. C. Booth, as the automobile was crossing the southernmost track. Plaintiff's intestate was killed instantly as a result of the collision.

At the time of the accident, electrical warning signals were located in the northwest and southeast corners of the railroad crossing. Each warning signal consisted of four hooded lights, two facing in a northerly direction and two in a southerly direction. Several witnesses testified that they did not hear any warning signals being given by these electrical warning devices. Furthermore, these witnesses stated that they did not hear any horns or whistles sounded by the approaching train.

At the completion of the presentation of plaintiff's evidence, the defendants, pursuant to G.S. 1A-1, Rule 50 of the Rules of Civil Procedure, moved for a directed verdict "upon the grounds that the plaintiff's evidence taken in the light most favorable to him fails to show that the defendant Booth or the defendant Railroad or either of them was guilty of any actionable negligence, and also upon the grounds that plaintiff's evidence shows as a matter of law Plaintiff's Intestate was guilty of contributory negligence and is therefore barred from recovery." This motion was allowed and from a judgment directing a verdict for the defendants, the plaintiff appealed.

Mast, Tew & Nall, P.A., by George B. Mast & Joseph T. Nall and W. R. Britt for plaintiff appellant.

Maupin, Taylor & Ellis by Richard C. Titus for defendant appellees.

HEDRICK, Judge.

The sole issue raised by this appeal is whether the trial judge was correct in directing a verdict in favor of the defendants at the completion of plaintiff's evidence. Plaintiff submits that the granting of the directed verdict was improper for two reasons: (1) plaintiff's evidence establishes that defendants were negligent and that such negligence was the proximate cause of the collision; (2) plaintiff's evidence does not establish that plaintiff was contributorily negligent as a matter of law.

[1] In the case at bar plaintiff offered evidence that the electrical warning signals were not operating; that the operator of the train gave no warning by whistle, bell, or otherwise of the train's approach; and that the plaintiff's intestate's view of the

Neal v. Booth

approaching train was obstructed just prior to the collision by the depot and by railroad cars on a service track in front of the railroad station. This evidence, when taken in the light most favorable to the plaintiff is sufficient *prima facie* to establish that defendants were negligent, and that their negligence was a proximate cause of the accident. *Kinlaw v. R. R.*, 269 N.C. 110, 152 S.E. 2d 329 (1967). Therefore, the decision in the instant case turns upon the question of whether the evidence establishes plaintiff's intestate's contributory negligence as a matter of law.

[2] It is a well-established rule that a railroad company is under a duty to give travelers "timely warning of the approach of its train to a public crossing, but its failure to do so doesn't relieve a traveler of his duty to exercise due care for his own safety, and the failure of the traveler to exercise such care bars recovery when such failure is a proximate cause of the injury." *Price v. Railroad*, 274 N.C. 32, 161 S.E. 2d 590 (1968). When the evidence proffered by plaintiff is considered in a light most favorable to him, it tends to show that at the time of the collision the plaintiff was traveling at a rate of 5 miles per hour and that his view was obstructed until he was 21 feet from the southernmost track (the track upon which the collision occurred). We are of the opinion that this evidence is sufficient to establish that plaintiff was contributorily negligent as a matter of law.

This conclusion finds support in two decisions of our Supreme Court which involved similar factual situations. In *Caruthers v. R. R.*, 232 N.C. 183, 59 S.E. 2d 782 (1950), the court found contributory negligence as a matter of law on the part of a driver who was traveling at 10-15 miles per hour and had an unobstructed view of the approaching train for 24 feet 8 inches. In holding that plaintiff was contributorily negligent as a matter of law, the court stated:

"The conclusion is inescapable that he failed to look as he approached the crossing and drove on the track at a time when by looking he could have seen the train and avoided injury. [citations omitted] The plaintiff's evidence points unmistakably to failure on the part of the intestate to exercise care for his own safety with fatal consequences."

Furthermore, in *Jeffries v. Powell* and *Branch v. Powell*, 221 N.C. 415, 20 S.E. 2d 561 (1942), the driver was proceeding

Harrington v. Harrington

at a speed of 5-10 miles per hour and had an unimpeded view for 30-40 feet. The court in finding plaintiff's negligence as the sole proximate cause of the accident commented that it was a matter of common knowledge that at the speed plaintiff was driving, he could have stopped the automobile almost instantly and avoided the collision.

Thus, the judgment directing a verdict for the defendants is

Affirmed.

Judges MORRIS and BAILEY concur.

JANE PRITCHETT HARRINGTON v. GEORGE FAULKNER
HARRINGTON

No. 7426DC369

(Filed 17 July 1974)

1. Divorce and Alimony § 13— order legalizing separation — separation for statutory period — abandonment as defense to divorce action

An order of the district court providing for custody of the children of the parties, providing for visitation privileges and requiring defendant husband to make child support payments legalized the separation of the parties, and the defense of abandonment was no longer available to defendant husband in the wife's action for an absolute divorce on the ground of a year's separation.

2. Divorce and Alimony § 13— separation for statutory period — adultery as defense to divorce action

Adultery is not a defense to an action for an absolute divorce on the ground of a year's separation.

APPEAL by defendant from *Black, Judge*, 10 December 1973 Session of District Court held in MECKLENBURG County.

Heard in the Court of Appeals 11 June 1974.

This is an action brought by plaintiff wife against defendant husband for an absolute divorce on the ground of a year's separation.

The parties were married on 29 November 1963. Two children, Bruce and Amy, were born of the marriage. On 29 June

Harrington v. Harrington

1971 the wife left the home of the husband, taking the children with her. The husband brought an action for custody of the children. The District Court issued an order on 24 April 1972, holding that the wife had abandoned the husband, but nevertheless awarding the wife custody of the children. The order provided that the husband was "entitled to reasonable visitation with the minor children," and that the husband was to make support payments of \$300.00 per month. The husband appealed to this Court, and in *Harrington v. Harrington*, 16 N.C. App. 628, 192 S.E. 2d 638, the District Court's order was modified so as to grant custody of Bruce to the husband and reduce the amount of the support payments. In all other respects the District Court's order was affirmed.

On 6 June 1973 the wife (hereinafter referred to as plaintiff) filed a complaint against the husband (hereinafter referred to as defendant), alleging that she had been separated from him for a year and was entitled to an absolute divorce. Defendant contested the divorce, and in his answer he alleged abandonment as his "First Defense" and adultery as his "Second Defense." Plaintiff moved to strike the "First Defense" and "Second Defense" as insufficient. The court granted her motion, and defendant appealed to this Court.

Farris, Mallard & Underwood, by E. Lynwood Mallard, for plaintiff appellee.

Joe T. Millsaps for defendant appellant.

BALEY, Judge.

Defendant has raised two defenses against plaintiff's complaint: abandonment and adultery. Neither is a valid defense in this case, and the District Court properly granted plaintiff's motion to strike them.

Ordinarily a person cannot obtain a divorce on the ground of a year's separation if he has brought about the separation by abandoning his spouse. *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562; *Rupert v. Rupert*, 15 N.C. App. 730, 190 S.E. 2d 693, *cert. denied*, 282 N.C. 153, 191 S.E. 2d 759. But when the spouse who has been abandoned obtains a divorce from bed and board, or an order for alimony without divorce, or any other order having the effect of a judicial separation, the separation is legalized, and after the passage of one year either spouse may

Harrington v. Harrington

obtain an absolute divorce. *Rouse v. Rouse*, 258 N.C. 520, 128 S.E. 2d 865; *Lockhart v. Lockhart*, 223 N.C. 559, 27 S.E. 2d 444; *Johnson v. Johnson*, 12 N.C. App. 505, 183 S.E. 2d 805, *cert. denied*, 279 N.C. 727, 184 S.E. 2d 884.

In *Rouse v. Rouse*, *supra* at 521, 128 S.E. 2d at 866, Justice Sharp explained the theory underlying the doctrine of legalized separation:

"The law does not require a man to live with his wife. It does, however, force him to support her in the absence of some compelling reason to the contrary. When the law, by civil judgment, has secured to the wife reasonable support and maintenance after a husband has wrongfully separated himself from her, it has required him to perform his legal obligation and can do no more. The separation is legalized from then on unless marital relations are resumed thereafter."

In the same way, the law does not require a woman to live with her husband. It does require her to act in the best interest of her children, and when a husband and wife are separated, the courts will take appropriate measures regarding the custody of the children. When the courts have done this, they have done all they can do, and the separation is thenceforth legalized.

[1] In this case, plaintiff's separation from defendant was legalized by the District Court order of 24 April 1972. As modified by the Court of Appeals, this order granted custody of Amy Harrington to plaintiff and custody of Bruce Harrington to defendant. It provided for visitation privileges and required defendant to make child support payments. There was also a finding that plaintiff had abandoned defendant. Clearly, in making this order, the District Court recognized the separation of the parties and gave judicial sanction to it. The separation was thereby legalized, and the defense of abandonment is no longer available to defendant.

[2] At one time adultery was a defense to an action for divorce on the ground of a year's separation. The North Carolina Supreme Court so held in the case of *Taylor v. Taylor*, 225 N.C. 80, 33 S.E. 2d 492, and *Pharr v. Pharr*, 223 N.C. 115, 25 S.E. 2d 471. But in *Pickens v. Pickens*, 258 N.C. 84, 127 S.E. 2d 889,

Harrington v. Harrington

the Supreme Court changed the rule of the *Taylor* and *Pharr* cases. In *Pickens*, the Court stated:

"If the husband alleges and establishes that he and his wife have lived separate and apart continuously for two years or more next preceding the commencement of the action within the meaning of G.S. 50-6, the only defense recognized by our decisions is that the separation was caused by the act of the husband in wilfully abandoning her."

258 N.C. at 86, 127 S.E. 2d at 890. Since the *Pickens* case was decided, the General Assembly has reduced the period of separation from two years to one year. G.S. 50-6.

It seems clear that the position taken by the Court in the *Pickens* case is the better one. See 1 Lee, N. C. Family Law, § 88, at 74 n. 74 (Supp. 1974). G.S. 50-6, the statute permitting divorce on the ground of a year's separation, was enacted in order to enable a husband and wife to terminate their marriage without the sensationalism and public airing of dirty linen which necessarily accompany a divorce based on fault. If this purpose is to be fully effectuated, recriminatory defenses other than the defense of abandonment should not be recognized in divorce actions based on separation. When a husband and wife have been separated for over three years and the wife has committed adultery, "the substance of the marriage has long since disappeared. The parties cannot live together in happiness; they have demonstrated that they have no intention to resume conjugal relations." 1 *id.* § 68, at 270 (1963). The preservation of a marriage which is only an empty shell can be of no benefit to the husband; it can be of no benefit to the wife; and it certainly can be of no benefit to society. In such a situation the parties should be allowed to end their marriage in a quiet and dignified manner, by means of a divorce on the ground of a year's separation. See generally 1 *id.* § 88, at 336-38 (1963).

The case of *Robuck v. Robuck*, 20 N.C. App. 374, 201 S.E. 2d 557, relied upon by defendant, does not hold that adultery is a defense to a divorce action based on separation. In *Robuck* the husband sued for divorce on the ground of a year's separation. The wife counterclaimed for alimony without divorce, alleging that her husband had maliciously turned her out of doors (which is a form of abandonment, *Pruett v. Pruett*, 247 N.C. 13, 23, 100 S.E. 2d 296, 303), committed adultery and offered indig-

Houston v. Rivens

nities. The husband contended that all these defenses were barred by a property settlement agreement which the wife had signed. This Court held that a mere property settlement agreement could not bar any defense to divorce. It did not discuss the question of whether adultery was a valid defense to an action for divorce on the ground of separation.

The District Court correctly held that the defenses of abandonment and adultery are not available to defendant in this action.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

OPHELIA W. HOUSTON AND HAROLD HOUSTON v. THOMAS
MONROE RIVENS

No. 7426DC453

(Filed 17 July 1974)

1. Appeal and Error § 31— assignment of error to charge

Plaintiffs' assignment of error to the trial court's instructions was insufficient where plaintiffs did not quote the objectionable portion of the charge to which they excepted, point out the alleged error, and indicate what the court should have charged.

2. Automobiles § 90— action arising from collision — instructions

Evidence in an automobile collision action was sufficient to create issues of fact and to justify the trial court's charge as to whether plaintiff kept her vehicle under control, maintained a proper lookout and gave a turn signal before attempting a left turn into a driveway.

3. Automobiles § 90— instructions — application to proper party

Though portions of the trial judge's instructions were expressly applied to both plaintiffs and defendant when they should have been applied only to defendant, the entire charge could have left no doubt in the minds of the jurors as to the respective duties of the parties, and plaintiffs, therefore, were not prejudiced.

4. Automobiles §§ 16, 90— passing vehicle — duty to sound horn — instructions

Trial court's instruction that absent a horn warning from defendant, plaintiffs would not be chargeable with knowledge of defendant's intention to pass was proper, though the court did not also instruct that plaintiffs had a right to assume that defendant would obey the statutory requirement of sounding his horn, since the instruction

Houston v. Rivens

given was tantamount to an instruction on plaintiffs' right to assume that other motorists would comply with the rules of the road.

APPEAL from *Stukes, District Judge*, 7 January 1974, Session of MECKLENBURG County District Court. Heard in the Court of Appeals 12 June 1974.

This action was instituted on 18 August 1972 seeking to recover for personal injuries and property damage sustained by plaintiffs as a result of an automobile accident. Defendant answered, alleging contributory negligence and counterclaimed for property damage.

The evidence tended to show that plaintiff Ophelia Houston was driving an automobile owned by plaintiff Harold Houston in an easterly direction on U. S. Highway 73 on the outskirts of Davidson in Mecklenburg County. Ophelia Houston was the first car in a line of three cars. The second vehicle was driven by Jerry McArn, and the third car was driven by defendant. The speed limit at the scene of the accident was 55 miles per hour.

McArn testified that he first observed Mrs. Houston's vehicle approaching him on Highway 73. The vehicle turned into a driveway, backed out into the highway, and began to travel in the same direction as McArn. McArn was travelling at 45 miles per hour when he first sighted the Houston vehicle, but he slowed down when she pulled out in front of him. The driveway in which Mrs. Houston turned around was approximately 300 yards from the scene of the accident. According to McArn, Mrs. Houston proceeded 50 to 75 yards before she turned on her turn signal, indicating a left turn. When Mrs. Houston began her left turn into the driveway, she had "almost come to a stop when she could take the turn," and McArn had slowed down to five to ten miles per hour. At this point, McArn observed defendant's vehicle overtaking him in the left lane. The vehicle of defendant was already in the left lane when plaintiff had started her left turn. When the plaintiffs' vehicle was partially in the driveway and partially on the pavement of the highway, defendant's car struck the left rear of plaintiffs' vehicle. McArn testified that he did not hear the defendant's vehicle sound a horn prior to passing him.

Plaintiff Ophelia Houston testified that she turned her blinker on approximately 200 feet prior to turning. Prior to

Houston v. Rivens

activating her turn signal, she looked in her rear view mirror and saw the two vehicles in line behind her. She heard no horn, and she did not see defendant's vehicle in the passing lane until she had begun to cross the left lane.

Defendant testified that he did not see plaintiff Ophelia Houston give a turn signal and he did not recall whether he blew his horn. He testified that while he was following the Houston vehicle and the McArn vehicle, his speed was 35 miles per hour. His speed decreased as the cars in front of him slowed down, and as he passed the McArn vehicle his speed increased to 25 miles per hour. At the time of impact, his speed was 10 miles per hour. From his position following the McArn vehicle, he was unable to see the Houston vehicle—it was not until he pulled out to pass that he saw the Houston vehicle.

At the close of all the evidence, both parties moved for directed verdicts. Both motions were denied and the case was submitted to the jury, which found that defendant was negligent and that plaintiff Ophelia Houston was contributorily negligent. Plaintiffs' motion for a judgment notwithstanding the verdict was denied, and plaintiffs appealed.

Chambers, Stein, Ferguson and Lanning, by Fred A. Hicks, for plaintiff appellants.

Sanders, Walker and London, by Robert G. McClure, Jr., for defendant appellee.

MORRIS, Judge.

Plaintiffs have brought forward multiple exceptions to the court's instructions to the jury. While we agree that portions of the instructions are erroneous in themselves, we do not feel that they are sufficiently prejudicial to warrant a new trial, when viewed contextually with the charge as a whole.

[1] In their first assignment of error, plaintiffs contend that the court failed to explain the law as it applied to the facts of the case and failed to apply the law to the facts of the case. This assignment brings forward only that exception numbered 19, which does not specify objectionable portions of the charge. Plaintiffs quote in their brief portions of the charge which they contend to be erroneous, but this is not sufficient to present a question on the charge. An assignment of error must quote the objectionable portion of the charge to which appellant excepts,

Houston v. Rivens

point out the alleged error, and indicate what the court should have charged. *Motors, Inc. v. Allen*, 20 N.C. App. 445, 201 S.E. 2d 513 (1974). This broadside exception is overruled. Plaintiffs have, however, properly brought forward other exceptions in other assignments of error which present the questions they attempted to raise in their first assignment of error.

[2] It is plaintiffs' position that the trial court erred in its instructions on femme plaintiff's failure to keep her vehicle under control, her failure to keep a reasonable lookout in her direction of travel, and in submitting the issue of whether she gave a turn signal before attempting a left turn into the driveway. The court instructed the jury as follows:

"... defendant Rivens alleges that the plaintiffs were negligent in the following respects: First, that the plaintiff failed to keep a proper lookout. That the plaintiff failed to keep the vehicle that Mrs. Houston was operating under proper control . . . and that plaintiffs turned their vehicle to the left without giving first, a plain visible signal of the intention of making such movement . . ."

There were in fact no such allegations. The court further instructed in effect that if the jury should find from the greater weight of the evidence that plaintiff failed to keep a proper lookout, failed to keep the vehicle under control, or turned left without giving a plainly visible signal, they should find plaintiff guilty of contributory negligence.

We feel that the evidence before the court justified such a charge. Defendant testified that he did not remember seeing a turn signal on the plaintiffs' vehicle, and while McArn testified that he saw a turn signal, he testified that it only blinked three or four times. Plaintiff testified that she did not see defendant's vehicle in the passing lane until she had begun to cross the left lane. We think that this evidence is sufficient to create issues of fact whether plaintiff kept her vehicle under control, maintained a proper lookout and gave a turn signal.

[3] Plaintiffs contend that the court erred in failing to delineate which instructions applied to the plaintiffs and which applied to the defendant. It is their position that the evidence relative to the duties of the parties was different. It is true that portions of the instructions were expressly applied to both parties when they should have been applied only to defendant.

Houston v. Rivens

Nevertheless, a thorough reading of the instruction as a whole convinces us that the charge could have left no doubt in the minds of the jurors as to the respective duties of the parties. An inaccuracy in the instruction will not be held prejudicial error when it is apparent from the charge, construed contextually, that the jury could not have been misled. *Hammond v. Bulard*, 267 N.C. 570, 148 S.E. 2d 523 (1966).

[4] Plaintiffs further assign error to the failure of the court to instruct that absent a horn warning from defendant, plaintiffs could not be charged with knowledge of defendant's intention to pass, and could assume that defendant would obey the statutory requirement of sounding his horn before attempting to pass plaintiffs. The court charged as follows:

"Now under this law it was the duty of the defendant to sound his horn before attempting to pass plaintiffs' vehicle, and that such sounding or warning be given to the driver of plaintiffs' vehicle in reasonable time to avoid injury or damage which would likely result to the plaintiffs and their vehicle while turning to the left. Now in the absence of such warning from the defendant, knowledge of his intent to pass may not be charged to the driver of the plaintiffs' vehicle."

Plaintiffs apparently take the position that it is not sufficient to instruct that plaintiffs would not be chargeable with knowledge of defendant's intention to pass; rather, they contend that the court must further instruct that plaintiffs had a right to assume that the defendant would obey the statutory requirement of sounding his horn. In *Wrenn v. Waters*, 277 N.C. 337, 177 S.E. 2d 284 (1970), the Supreme Court held an instruction deficient in that it failed to charge that

"... in the absence of anything which gives or should give notice to the contrary, a motorist has the right to assume and to act on the assumption that opposing drivers will observe the rules of the road and stop in obedience to a traffic signal." *Id.*, at 340-341.

It is clear that the evidence in the case before us dictates an instruction on the necessity for a horn warning and the effect of the absence of such warning. We feel, however, that the instruction given was tantamount to an instruction on plaintiffs' right to assume that other motorists would comply with the

State v. Wright

rules of the road, particularly when viewed in the context of the entire charge in which we find no prejudicial error.

No error.

Judges BRITT and BALEY concur.

STATE OF NORTH CAROLINA v. DEXTER WRIGHT

No. 744SC493

(Filed 17 July 1974)

1. Robbery § 4— armed robbery — aiding and abetting — sufficiency of evidence

Evidence was sufficient to show that defendant aided and abetted another in an armed robbery where it tended to show that defendant transported the principal to the home of the victim where the robbery took place and then went back to the victim's store where he waited to assist the principal in getting away.

2. Criminal Law § 9— defendant away from crime scene — aider and abettor — sufficiency of evidence

Where defendant and two others entered into a plan to rob a storeowner, defendant became a party to the breaking, entering, and larceny of the store, though he was at the home of the storeowner when the offenses were committed and though they may have been committed without his knowledge, consent, assistance or encouragement.

3. Larceny § 8— felonious larceny — value of property taken — instructions unnecessary

The trial court did not err in failing to instruct the jury that they must find that the value of the property stolen from the store exceeded \$200 in order to find defendant guilty of felonious larceny, since the crime of larceny is a felony without regard to the value of the property in question if the larceny is committed pursuant to a felonious breaking or entering.

ON *certiorari* to review judgments of *Copeland, Judge*, entered at the 23 October 1972 Session of Superior Court held in ONSLOW County.

Defendant and Daniel Jones (Jones) were charged jointly in a bill of indictment with the felonies of (1) breaking and entering a store belonging to Robert L. Petrea and (2) larceny of chattels and money from said store. In another bill of in-

State v. Wright

dictment, defendant and Victor Ray Owens, Jr., (Owens) were charged with the armed robbery of Petrea. Defendant pleaded not guilty to all charges.

Defendant was tried separately from his codefendants and principal testimony against him was provided by them. The State's evidence tended to show:

During the evening of 13 September 1972, Jones and Owens discussed their need for money to provide for their defense in criminal charges then pending against them. They decided to rob a store and needed a getaway car. They approached defendant, Jones' brother-in-law, about borrowing his car but defendant insisted on going with them. Around 10:30 p.m. or later, the three of them went to Jones' house and picked up a shotgun and a pistol. Owens had a wig and a brassiere which he put on "after they got moving"; he also had a woman's carrying bag. They drove to the Piney Green Community of Onslow County where they had planned to rob a Jippy's(?) grocery store. On arrival at that store, they found a large number of people in and around the place. They then decided to rob Petrea's store which was in the same area.

When they arrived at Petrea's, they observed that he had closed the store but was inside checking up. Their attention was temporarily distracted by some people using a pay telephone in the vicinity, and when they looked toward the store again, Petrea had come out and was getting into his automobile. Jones stayed at the store while defendant and Owens followed Petrea several miles to his home for purpose of getting Petrea and bringing him back to the store to rob him. Upon arrival at Petrea's home, at Owens' direction, defendant left Owens there and returned to the store.

Owens proceeded to enter Petrea's home and, at gunpoint, ordered Petrea to go with Owens back to the store. Petrea told Owens that he had the store's money at the house and proceeded to deliver more than \$400 to Owens. Owens then forced Petrea, his wife, son and grandson into Petrea's car and required Petrea to transport him several miles but not to the store. During that time, Owens and Petrea exchanged shots, Petrea shooting Owens in his chin and Owens shooting Petrea in his leg.

When defendant returned to the store, he found Jones inside. Jones had made entry into the store by removing a panel

State v. Wright

from a rear door. After entering, Jones had looked around and found a large collection of coins. He placed them in bags and removed them to the hole at the back door where he had entered the store. When Jones saw defendant returning, he instructed defendant to drive near the back. Defendant then went to the hole at the back door where he assisted Jones in removing the coins from the store and into defendant's car.

After leaving the store, Jones and defendant rode around for some time looking for Owens. Failing to find Owens, they went to Jones' home where Owens joined them later that night. The three of them divided part of the money that had been taken, defendant receiving \$100. The next morning, Owens was taken to a hospital in Goldsboro for treatment of his injuries.

A jury found defendant guilty as charged. The court entered judgments imposing prison sentences as follows: on the armed robbery count, not less than 15 nor more than 20 years to be credited with time spent in jail awaiting trial; on the breaking and entering count, 10 years to run concurrently with the sentence imposed on the armed robbery count; on the larceny count, 10 years to run concurrently with the sentence imposed on the breaking and entering count. The court recommended that all sentences be served in a youthful offenders unit.

Defendant appealed and the appeal not being perfected within the time permitted by our rules, we allowed certiorari.

Attorney General Robert Morgan, by Associate Attorney Archie W. Anders, for the State.

Cameron and Collins, by William M. Cameron, Jr., for defendant appellant.

BRITT, Judge.

Defendant contends the evidence was insufficient to support his convictions of the felonies of armed robbery, breaking and entering, and larceny. He argues that the armed robbery of Petrea at Petrea's home by Owens, and the breaking into and entering the store by Jones, were committed without his knowledge, consent, assistance or encouragement. As to the larceny, he argues it had been committed when he returned to the store, and that at most, he was a participant in concealing stolen property. We reject these arguments.

State v. Wright

The State contends defendant was an aider and abettor in the commission of the crimes charged. A principal in the first degree is one who actually commits the offense with his own hand; an aider and abettor is a principal in the second degree. *State v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5 (1952). There is no practical difference between principals in the first and second degrees, since all are equally guilty. *State v. Spencer*, 239 N.C. 604, 80 S.E. 2d 670 (1954); *State v. Best*, 232 N.C. 575, 61 S.E. 2d 612 (1950). An aider and abettor is one who advises, counsels, procures, encourages or assists another in the commission of a crime. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973) and cases therein cited.

[1] We have no difficulty in concluding that defendant aided and abetted Owens in the armed robbery of Petrea. Certainly, defendant encouraged and assisted Owens in the commission of the crime when he transported Owens to the scene of the crime and then went back to the store where he waited to assist Owens in getting away. We think it makes no difference that the robbery occurred at Petrea's home rather than at his store.

[2] With respect to defendant's being an aider and abettor in the breaking and entering, in *State v. Maynard*, 247 N.C. 462, 470, 101 S.E. 2d 340, 346 (1958), we find: "... 'Everyone who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any one of the others, in furtherance of such common design.' (Citations.)" Quoted with approval by Justice Higgins in *State v. Lovelace*, 272 N.C. 496, 498, 158 S.E. 2d 624, 625 (1968).

Defendant entered into a common purpose or design with Owens and Jones to obtain Petrea's money by unlawful means, and we think defendant became a party to the breaking, entering, and larceny by Jones.

We hold that the evidence was sufficient to sustain the verdicts returned by the jury.

[3] Defendant contends that the court erred in not instructing the jury that they must find that the value of the property stolen from the store exceeded \$200 in order to find defendant guilty of felonious larceny. The contention is without merit. The crime of larceny is a felony, without regard to the value of the

Burkhead v. White

property in question, if the larceny is committed pursuant to a felonious breaking or entering. G.S. 14-72; *State v. Raynes*, 272 N.C. 488, 158 S.E. 2d 351 (1968). We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges MORRIS and BAILEY concur.

JEANETTE L. BURKHEAD v. ELLIOTT S. WHITE AND WIFE,
SWANNER P. WHITE

No. 7419SC324

(Filed 17 July 1974)

1. Negligence § 53— invitees — duties of proprietor

The owner or proprietor of premises open to invitees is under a duty of ordinary care to keep those areas designed for the use of invitees in a reasonably safe condition so as not to expose invitees unnecessarily to danger.

2. Negligence § 57— fall of invitee on polished floor — sufficiency of evidence of negligence

In an action to recover for personal injuries sustained by plaintiff while she was visiting her daughter who rented a room with defendants, the trial court properly granted defendants' motion for a directed verdict where the evidence tended to show that defendants maintained highly polished hardwood floors, a scatter rug was on the hardwood floor, plaintiff slipped on the rug, fell on the floor and broke her leg, plaintiff had traversed the area many times before, and there was no showing that a dangerous condition existed or that defendants failed to exercise ordinary care to keep their premises in a reasonably safe condition.

APPEAL by plaintiff from *Martin (Robert M.)*, Judge, 24 September 1973 Session of Superior Court held in RANDOLPH County. Heard in the Court of Appeals on 14 May 1974.

On 31 May 1967, plaintiff was in Greensboro, North Carolina, visiting her daughter, who was enrolled at UNC-G. The daughter, who rented a room from the defendants on a weekly basis, was given a key to the front door and allowed to park in a parking area at the rear of the house.

Defendants' residence is a two-story house with two entrances. From the front-door entrance, one has direct access to

Burkhead v. White

the stairway leading to the second-floor room occupied by the daughter of the plaintiff. To gain access to the second floor after entering the rear entrance, one must travel through the kitchen, dinette area, dining room and a hallway before arriving at the stairway. The dinette area is raised, necessitating a step-down from the level of the dinette floor to either the kitchen or the dining room. The dining room floor is a polished hardwood surface. A scatter rug was on the dining room floor.

Plaintiff's evidence tends to show the following: On 31 May 1967, plaintiff and her daughter returned to defendants' residence after dinner and entered by way of the rear entrance. As plaintiff stepped down from the raised dinette area into the dining room, she stepped onto the scatter rug, which slid up onto the large area rug, causing plaintiff to fall on the hardwood floor. As a result of the fall, plaintiff sustained a broken leg and was taken to the Moses Cone Hospital in Greensboro, where it was determined that plaintiff would have to undergo surgery. The severity of plaintiff's fracture necessitated the installation of a metal ball in plaintiff's femur so that it would connect with the hip socket.

Plaintiff alleges that as a result of the fall in defendants' residence, she has been rendered physically incapable of sustaining any employment. Plaintiff also alleges that as a result of the fracture in May, 1967, her left leg was weakened to the extent that she suffered a fall on 13 December 1968 and received identical corrective surgery on her right leg. Plaintiff alleges that on 2 January 1970, as a result of her injuries on 31 May 1967, her hip gave way, causing plaintiff to fall and sustain a broken wrist.

At the close of plaintiff's evidence, defendants moved for a directed verdict, pursuant to Rule 50, on the grounds that plaintiff had failed to offer evidence of negligence on the part of defendants which was a proximate cause of plaintiff's injuries and that even if plaintiff had offered any evidence of negligence against defendants, plaintiff's own evidence established contributory negligence on the part of plaintiff. The trial court granted defendants' motion for a directed verdict.

Plaintiff appealed to this Court.

Ottway Burton for the plaintiff.

Henson, Donahue & Elrod, by Daniel W. Donahue and Richard L. Vanore, for the defendants.

Burkhead v. White

BROCK, Chief Judge.

Plaintiff's sole contention is that the trial court committed error in holding there was no negligence on the part of defendants, and that even if plaintiff had presented evidence of the negligence of defendants, the plaintiff's own evidence showed plaintiff was guilty of contributory negligence, and in entering a directed verdict for defendants.

Plaintiff contends that the facts show that plaintiff held the status of an invitee when she was injured while visiting her daughter, a tenant, in defendants' residence. Although we do not concede that plaintiff's status was that of an invitee, we consider her in that favored status for the purpose of this decision.

[1] The owner or proprietor of premises open to invitees is under a duty of ordinary care to keep those areas designed for the use of invitees in a reasonably safe condition so as not to expose invitees unnecessarily to danger. The owner or proprietor is under a duty to warn invitees of concealed dangers or unsafe conditions of which he has knowledge. 6 Strong, N. C. Index 2d, Negligence, § 53, p. 107.

[2] Taking plaintiff's evidence in the light most favorable to her, it discloses that defendants maintained highly polished hardwood floors; that a scatter rug was on the hardwood floor; and that plaintiff's daughter, after plaintiff's fall, advised plaintiff that she had slipped and fallen on the same rug two weeks prior to plaintiff's accident.

The use of a scatter rug on a floor is not negligence. *Jenkins v. Brothers*, 3 N.C. App. 303, 164 S.E. 2d 504. The evidence of the daughter's fall at a prior time is of no assistance to plaintiff. She had crossed this same rug many times during her tenancy at the residence without falling, and the cause of her one fall is only a matter of conjecture. The evidence shows nothing about the daughter's fall which would charge defendants with knowledge of a concealed danger or unsafe condition.

In the fall of 1966, plaintiff arranged with defendants for the rental of the room to plaintiff's daughter. Plaintiff assisted her daughter in moving into the rented room. In doing so, she walked through this same area many times. She was familiar with the step-down, the polished hardwood floor and the scatter rug. Between the fall of 1966 and May 31, 1967, plaintiff visited

State v. Page

her daughter in defendants' home many times. During these visits, plaintiff walked through this same area many times. Plaintiff's daughter and defendants walked through this same area daily. In all of this traversing of the step-down, the polished floor and the scatter rug, there was no indication of a dangerous condition or a failure by defendants to exercise ordinary care to keep their premises in a reasonably safe condition.

"In order to establish actionable negligence, plaintiff must show that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to the plaintiff under the circumstances in which they were placed, and that such negligence was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed." *Jackson v. Gin Co.*, 255 N.C. 194, 120 S.E. 2d 540.

Doubtless, plaintiff suffered a serious and painful injury, but she has failed to show actionable negligence on the part of defendants. In view of this disposition, it is unnecessary to consider the question of contributory negligence. The judgment appealed from is

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. GEORGE E. PAGE

No. 7414SC447

(Filed 17 July 1974)

1. Criminal Law § 75— admission of in-custody statements

The trial court did not err in the denial of defendant's motion to suppress evidence of statements made by defendant to the investigating officers where the court found from competent *voir dire* evidence that defendant made the statements freely, voluntarily and with understanding of his rights, including his right to counsel.

2. Criminal Law § 100— private prosecutor

The trial court in a homicide prosecution did not err in permitting privately employed counsel to assist the solicitor in the prosecution of the case.

State v. Page

3. Criminal Law § 100— private prosecutor

While the trial judge has discretion to permit private counsel to appear with the solicitor, the solicitor should not relinquish the duties of his office to such counsel but should remain in charge of and responsible for the prosecution. G.S. 7A-61.

4. Criminal Law § 102— remarks of private prosecutor — absence of prejudice

Defendant was not prejudiced by a statement of the private prosecutor that a witness's brother had just shaken his finger at the prosecutor in a threatening manner where the court instructed the jury that the prosecutor's remarks were not relevant to the question of defendant's guilt or innocence and should be disregarded, and the jurors stated, upon inquiry by the court, that such remarks would not influence their verdict.

APPEAL by defendant from *Canaday, Judge*, 5 November 1973 Session of Superior Court held in DURHAM County. Heard in the Court of Appeals 28 May 1974.

Defendant was charged in a bill of indictment, proper in form, with the murder of Donald Meadows.

The State's evidence consisted primarily of statements made by defendant to the victim's father, to the victim's mother and stepfather, and to the investigating officers. Immediately after the homicide, defendant awakened the victim's father and said: "Get up, I have killed Donald." Shortly after the homicide, the victim's mother asked defendant why he killed her son, and defendant replied: "He is not the first one, he is my third one I have killed." Shortly after the homicide, defendant made statements to the victim's stepfather, who quoted him as follows: "Yes, I killed him. He is not my first one. He is my third one." Defendant also told the investigating officers that he and the victim had been arguing; that the victim threatened defendant, and defendant shot the victim with a shotgun. Defendant voluntarily turned the shotgun over to the officers.

The jury found defendant guilty of voluntary manslaughter, and judgment of imprisonment for a term of not less than 15 nor more than 20 years was entered. Defendant appealed.

Attorney General Morgan, by Associate Attorney Gruber, for the State.

Clayton, Myrick & McCain, by Robert W. Myrick, for the defendant.

State v. Page

BROCK, Chief Judge.

[1] Defendant assigns as error the denial of his motion to suppress the evidence of statements by defendant to the investigating officers. Defendant argues that he did not voluntarily and knowingly waive the presence of counsel at the interrogation. Defendant's argument seems to be more academic than practical. The statements made to members of the victim's family were clearly competent and probably more damaging to defendant than his statement to the officer. The statement to the officer tended to establish some modicum of justification for the shooting. Nevertheless, the trial judge conducted an extensive *voir dire* and found from competent evidence that defendant freely, voluntarily and with understanding of his rights, including his right to counsel, made the statements to the investigating officers. Such findings, when supported by competent evidence, will not be disturbed on appeal.

[2] Defendant's primary assignment of error relates to the appearance of Mr. Blackwell M. Brogden, who was privately employed to assist the solicitor in the prosecution of the charge against defendant. Defendant moved to dismiss Mr. Brogden from appearing with the solicitor, and assigns as error the denial of his motion.

[3] "The discretion vested in the trial judge to permit private counsel to appear with the solicitor has existed in our courts from their incipency." *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1. However, the solicitor should not relinquish the duties of his office to privately employed counsel. The solicitor should remain in charge of and responsible for the prosecution of criminal actions. G.S. 7A-61. Except for the most compelling reasons, the trial judge should not permit the solicitor to abdicate his duties and responsibilities in a criminal action and permit privately employed counsel to assume responsibility for the prosecution.

In this case, the solicitor called the case for trial, and arraigned the defendant. Absent a showing to the contrary, we assume that the solicitor remained in charge of the prosecution throughout the trial. However, we do note that Mr. Brogden examined each of the State's witnesses, cross-examined each of the defense witnesses, and made the only argument for the State to the jury. The difficulty experienced by the trial judge in keeping Mr. Brogden's examination and cross-examination

State v. Page

of witnesses within proper bounds occurred during the extensive *voir dire*. Therefore, the jury could not have been prejudiced against defendant by such questioning. The trial judge announced that he considered the questioning irrelevant and that he was not going to consider it for any purpose. Defendant has failed to show prejudice from the improper examination and cross-examination of witnesses by Mr. Brogden during the *voir dire*.

[4] One further impropriety by Mr. Brogden merits discussion. At the close of cross-examination of the defense witness, William Thomas Jacobs, the following transpired:

“MR. BROGDEN: I want to bring your attention to Mr. Pervis Jacobs back yonder in the back of the Courtroom point his finger at me and his brother is a witness just on the stand. The man right yonder in the yellow jacket shook his finger at me in a threatening manner, and I would like to be sworn to show it.

“THE COURT: Now, just a minute.

“MR. MYRICK: All of this would best be done out of the presence of the jury if Mr. Brogden is insisting on making a scene in the Courtroom.

“THE COURT: I will hear that, Mr. Brogden, if you wish to pursue it, but not in open Court in the midst of this trial.”

Thereafter, the trial judge instructed the jury that Mr. Brogden's remarks were not relevant to the question of guilt or innocence of the defendant and should be disregarded entirely. He then carefully questioned each juror to determine whether each could and would pass upon the evidence in the case, unaffected by Mr. Brogden's remarks. The jurors answered that the remarks would not in any way impair or prejudice defendant's case in their minds and would not in any way influence their consideration of a verdict in the case.

Although we concede that the remarks by Mr. Brogden were highly improper, we feel that the trial judge's instruction to the jurors and their responses erased all possible prejudice to defendant.

No error.

Judges CAMPBELL and BRITT concur.

State v. Hammock

STATE OF NORTH CAROLINA v. ELWOOD HAMMOCK

No. 7413SC536

(Filed 17 July 1974)

1. Assault and Battery § 14— assault on officer serving capias — necessity for introducing capias

In a prosecution for assault upon a law officer while such officer was in the performance of his duties, it was not necessary for the State to offer into evidence the capias which the officer was attempting to serve on defendant at the time the officer was assaulted, since the State's evidence tended to show that defendant knew the officer was at defendant's home in the performance of his duties.

2. Assault and Battery § 14— assault on officer in performance of duty — sufficiency of evidence

In a prosecution for assault upon a law officer while such officer was in the performance of his duties, the trial court properly denied defendant's motion for nonsuit where the evidence tended to show that the deputy sheriff who approached defendant's home was a law enforcement officer and this was known to defendant, the deputy was performing or attempting to perform his duties as a law enforcement officer and this was known to defendant, and defendant assaulted the deputy with a firearm.

APPEAL by defendant from *Braswell, Judge*, 21 January 1974 Session of Superior Court held in BRUNSWICK County. Heard in the Court of Appeals 21 June 1974.

Defendant was charged in a bill of indictment with assault with a firearm upon a law-enforcement officer while such officer was in the performance of his duties. G.S. 14-34.2.

The State's evidence tended to show the following: On 16 May 1973, a capias was delivered to Brunswick County Deputy Edwards to be served on defendant. Defendant lived with his wife in a part of the building which houses Bessie's Package Store at Yaupon Beach. When Deputy Edwards went into Bessie's Package Store, he observed defendant and his wife through a two by three foot opening in the interior wall, which facilitated a view from the kitchen of the dwelling portion of the building into the package store portion of the building. Defendant was seated at the kitchen table. Deputy Edwards spoke to defendant through the opening in the wall and asked defendant if he was aware he had been due in court that day. Defendant stated that he had sent a doctor's excuse and had been excused. Deputy Edwards told defendant he would check with the radio

State v. Hammock

dispatcher to determine if defendant had, in fact, been excused. After using his patrol car radio, Deputy Edwards returned to Bessie's Package Store and told defendant that his excuse had been denied by Judge Clark. Deputy Edwards then asked defendant to come with him so they could get the matter straightened out. The deputy testified: "he then seemed very nervous and excited, and he brought up a double barrel shotgun from behind his right leg, level with my eyes through the hole, and told me that he wasn't going anywhere with any son of a bitch." Deputy Edwards backed out of the store and used his patrol car radio to summon help.

Deputies Reed and Padgett arrived shortly. In the meantime, defendant called Mr. L. D. Jones, assistant police chief at Yaupon Beach, on the telephone and told him "that the deputy sheriff was up there after him and was going to put him in jail and he had been in jail a good bit of his life and that he wasn't going to any jail with any deputy sheriff." Shortly thereafter, Assistant Chief Jones, while driving to work, saw defendant and the sheriff's deputies.

Deputy Padgett was at a corner of the building with his pistol drawn. Deputy Reed was taking a shotgun from his patrol car. Deputy Edwards was behind his patrol car with a gun across the car. Defendant was standing in the doorway to the building. Defendant had a shotgun pointed in the direction of Deputy Edwards, and he had his arms around his wife with his wife shielding him. Assistant Chief Jones tried to talk to defendant, but defendant said, "You're not going to take me anywhere either," and he leveled the shotgun at Jones. In spite of the shotgun, Jones continued to talk to defendant until he was close enough to take the shotgun from his hands. Jones opened the breechblock and removed two shells. Defendant was then transported to court in Deputy Reed's patrol car.

Defendant offered evidence which tended to show that defendant lacked the mental capacity on the day of the incident to know the nature and quality of his act or to distinguish between right and wrong.

The jury returned a verdict of guilty as charged.

Attorney General Morgan, by Associate Attorney Hassell, for the State.

Murchison, Fox & Newton, by Carter T. Lambeth, for the defendant.

State v. Hammock

BROCK, Chief Judge.

[1] Defendant assigns as error the refusal of the trial court to nonsuit the charge against defendant because the State made no showing that Deputy Edwards was acting under a valid capias. It seems to be defendant's contention that it was necessary for the State to offer the capias in evidence or satisfactory evidence of its contents.

Deputy Edwards testified that he was given a capias to serve on defendant and that he went to Bessie's Package Store for the purpose of serving the capias. Capias is "The general name for several species of writs, the common characteristic of which is that they require the officer to take the body of the defendant into custody; they are writs of attachment or arrest." Black's Law Dictionary, 4th ed. Therefore, there was evidence that Deputy Edwards had in his possession an order to take defendant into custody. Also, the State's evidence tends to show that defendant was aware that the deputy was there to take him to jail. He told Assistant Chief Jones that he was not going to jail with the deputy. Defendant's own evidence tends to show that he knew the deputy was there in the performance of his duties. The only purpose for introduction of the capias itself into evidence would have been to establish the content of the capias. Such was not required in this case.

[2] Defendant argues as though he were convicted of resisting arrest. However, he was charged and convicted of assault with a firearm upon a law-enforcement officer while such officer was in the performance of his duties. The State's evidence tends to show: (1) that Deputy Edwards was a law-enforcement officer, and this was known to defendant; (2) that Deputy Edwards was performing or attempting to perform his duties as a law-enforcement officer, and this was known to defendant; and (3) that defendant assaulted Deputy Edwards with a firearm. Even if it could be established that the capias was void, it would not justify defendant's assault upon Deputy Edwards. *State v. Wright*, 1 N.C. App. 479, 162 S.E. 2d 56.

We have examined defendant's remaining assignments of error, and find them to be without merit.

No error.

Judges MORRIS and VAUGHN concur.

Freight Carriers v. Allen Co.

PILOT FREIGHT CARRIERS, INC. v. DAVID G. ALLEN COMPANY, INC.

No. 7410DC311

(Filed 17 July 1974)

Carriers § 12; Quasi-Contracts § 2— action for shipping charges — quasi-contract — summary judgment — liability — damages

The trial court properly entered summary judgment for plaintiff on the issue of liability in a quasi-contract action brought by a motor carrier to recover for the delivery of bags of stone ordered by defendant and used by defendant in a construction project; however, the court erred in entering summary judgment for plaintiff on the issue of damages since that was a question for the jury.

APPEAL by defendant from *Barnette, Judge*, 22 October 1973 Session of District Court held in WAKE County. Heard in the Court of Appeals on 30 May 1974.

This is a civil action wherein the plaintiff, Pilot Freight Carriers, Inc., a North Carolina corporation, seeks to recover the sum of one thousand three hundred seventy-three dollars and ninety-nine cents (\$1,373.99) from defendant, David G. Allen Company, Inc., a North Carolina corporation. The sum sought to be recovered represents the amount allegedly owed to plaintiff as a result of plaintiff-carrier having delivered 930 bags of crushed stone to defendant for use by the latter in its construction work on the Raeford Turkey Plant.

In 1969 the defendant company entered into a contract with the Raeford Turkey Plant to install certain tile floor on a "cost plus 10%" basis. Thereafter, as a result of this contract, the defendant ordered 930 bags of crushed stone from the Master Mechanics Company in Cleveland, Ohio. The Master Mechanics Company in turn contacted a Canadian supplier, Minnesota Minerals Ltd., who shipped the crushed stone to Raeford, North Carolina. The bill of lading which accompanied said shipment consigned the goods to "The Master Mechanics Company, c/o David G. Allen Company, Inc., c/o Raeford Turkey Plant, Raeford, North Carolina." The crushed stone was shipped from Ontario, Canada, to Winston-Salem, N. C., via Inter City Truck Lines and from Winston-Salem to Raeford by the plaintiff in the instant case. Subsequently, the crushed stone was used by the defendant company in the course of its construction work on the turkey plant.

Freight Carriers v. Allen Co.

On 6 April 1971, some fifteen months after delivery of the goods, the defendant received a first notice and demand from plaintiff for payment of the shipping charges. Defendant, denying its accountability, refused to pay the charges. On 3 November 1972, plaintiff filed a complaint seeking to recover the shipping charges from defendant and founded its claim upon express contract. Several months later the plaintiff amended its complaint, over defendant's objection, to bottom its claim in the alternative upon quasi-contract. The defendant filed an answer denying that it was responsible for the shipping charges and counterclaimed for \$137.40, which sum represents 10 percent of the costs of shipping the stone and which defendant claims it was deprived of collecting from the Raeford Turkey Plant (on its "cost plus 10 percent" contract) by the negligence of plaintiff.

Both parties moved for summary judgment; and from the granting of summary judgment for the plaintiffs in the amount of \$1,373.99, defendant appealed.

Smith, Hibbert & Pahl by Carl W. Hibbert for the plaintiff appellee.

Dixon and Hunt by Daniel R. Dixon for defendant appellant.

HEDRICK, Judge.

The single question presented by this appeal is whether the trial court correctly entered summary judgment in favor of the plaintiff. Summary judgment is the proper procedure if examination of the pleadings, interrogatories, affidavits, etc., discloses that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c), Rules of Civil Procedure. The propriety of summary judgment in the instant case involves a discussion of the following two propositions: (1) Was summary judgment properly entered with regard to the issue of liability; (2) Was summary judgment properly entered with regard to the issue of damages?

— I —

"In the absence of anything to indicate a contrary intention of the parties, where one performs for another a useful service of a character that is usually charged for and such service is rendered with knowledge and approval of the recipi-

Freight Carriers v. Allen Co.

ent, who either expresses no dissent or avails himself of the service rendered, the law raises an implied promise on the part of the recipient to pay the reasonable value of such service. The general rule is that where services are rendered by one person for another, and are knowingly and voluntarily accepted, without more, the law presumes that such services were given and received in the expectation of being paid for, and implies a promise to pay their reasonable worth." 66 Am. Jur. 2d, Restitution and Implied Contracts, § 24, p. 968. See also, *Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968).

A careful survey of the pleadings, exhibits, affidavits, and other documents filed in the motion for summary judgment reveals that the defendant did receive 930 bags of stone, which was delivered by plaintiff, and incorporated this crushed stone into the fabrication of the turkey plant. Moreover, no express contract existed between the parties. These uncontroverted facts manifest a benefit conferred by plaintiff and acceptance of such benefit by the defendant. Such circumstances dictate, in the absence of an express contract, that quasi-contract principles be imposed to prevent one party from being unjustly enriched to the detriment of the other. Therefore, the trial court correctly entered summary judgment in favor of the plaintiff as to the issue of liability.

— II —

Next, directing our attention to whether summary judgment was properly entered with regard to the issue of damages, we are of the opinion that the trial court incorrectly granted summary judgment as to this aspect of the case. In an action founded upon the theory of quasi-contract, the measure of the recovery is determined by the value of the actual benefit realized and retained. *Stout v. Smith*, 4 N.C. App. 81, 165 S.E. 2d 789 (1969); 66 Am. Jur. 2d, Restitution and Implied Contracts, § 28, p. 973. The value of the services rendered and retained "is determined largely by the nature of the work and the customary rate of pay for such work in the community and at the time the work was performed." 66 Am. Jur. 2d, Restitution and Implied Contracts, § 28, p. 973. The only evidence in this record as to the value of the services rendered by the plaintiff and retained by the defendant is that shown on the "Freight Waybill"; and while not conclusive, it may be considered, if shown to be consistent with the Interstate Commerce Commission's Schedule of

Brown v. Moore

Rates and Tariffs, together with other evidence, if any, in determining the reasonable value of such services.

The result is—as to the issue of defendant's liability: summary judgment for the plaintiff is affirmed; as to the issue of damages: summary judgment for plaintiff in the amount of \$1,373.99 is reversed, and the cause is remanded to the District Court for a determination of the issue of damages consistent with the principles of law herein set out.

Affirmed in part; reversed in part.

Judges MORRIS and BAILEY concur.

EVELYN B. BROWN, ADMINISTRATRIX OF THE ESTATE OF MICHAEL
RAY BROWN, DECEASED v. EDWARD MICHAEL MOORE

No. 7418SC431

(Filed 17 July 1974)

1. Trial § 43— correction of verdict by jury

Where the jury in a wrongful death action answered the issue of compensatory damages, "Expenses for funeral, burial plot and ambulance, as cited in Court," the trial court did not err in permitting the jury to correct its improper verdict by substituting the sum of such expenses as its verdict on the damages issue.

2. Trial § 52— setting aside verdict for inadequacy

The trial court in a wrongful death action did not err in refusing to set aside for inadequacy a verdict which compensated plaintiff only for funeral, burial plot and ambulance expenses.

APPEAL by plaintiff from *Long, Judge*, 7 January 1974 Session of Superior Court held in GUILFORD County. Heard in the Court of Appeals on 8 May 1974.

This is a wrongful death action wherein the plaintiff, Evelyn B. Brown, Administratrix of the estate of Michael Ray Brown, seeks to recover damages from defendant, Edward Michael Moore, for the death of her 17 year old son, who was fatally injured in a one-car wreck which occurred on a rural paved road in Davidson County, North Carolina, approximately one mile south of High Point. At the time of the accident, the plaintiff's son was a passenger in the car being driven by defendant.

Brown v. Moore

At trial, the plaintiff presented the testimony of the investigating highway patrolman who testified that the accident occurred on a sharp curve on a rural road where the speed limit was 55 miles per hour. The officer stated that the defendant told him after the accident that he was "going something less than a hundred" just prior to losing control of the vehicle.

Terry Lee Gray, another passenger in the defendant's vehicle on the night of the accident, testified that the boys had been riding around most of the evening. Gray described the events preceding the accident as follows:

"Prior to the time he started speeding where the speed limit changed, I had no reason to fear riding with him. At the point where he did start speeding, I asked him to slow down several times. He didn't say anything. He didn't slow down. As we started into the curve where the wreck happened, I told him, 'Since you are not going to slow down, I am going to get in the back', so I started to get in the back and he told me he didn't blame me for getting in the back, so I went ahead and got in the back seat. I mentioned the curve to him prior to approaching the curve and getting in the back seat. I told him there was a bad curve coming up and we might not make it. While I was climbing over the back seat and going into that curve, Mike Brown told Mike to hold the car inside and work his way out in the curve. Mike Brown did not say anything else while we were on Burton Street Extension before that time."

The plaintiff also offered evidence tending to show that her son had a good reputation in the community where he lived.

Defendant testified, and his version of the accident did not differ in material part from plaintiff's evidence.

The following issues were submitted and answered by the jury as indicated:

"1. Was the plaintiff's intestate, Michael Ray Brown, injured by the negligence of the defendant, Edward Michael Moore?

Answer: Yes

2. Did Michael Ray Brown, by his own negligence, contribute to his injury?

Answer: Yes

Brown v. Moore

3. Was the plaintiff's intestate, Michael Ray Brown, injured by the wilful and wanton negligence of the defendant, Edward Michael Moore?

Answer: Yes

4. What amount, if any, should the plaintiff recover of the defendant for compensatory damages?

Answer: \$2,756.84

5. What amount, if any, should the plaintiff recover of the defendant for punitive damages?

Answer: None."

From entry of judgment on the verdict, plaintiff appealed.

Floyd & Baker by Walter W. Baker, Jr., for plaintiff appellant.

Henson, Donahue & Elrod by Perry C. Henson and Sammy R. Kirby for defendant appellee.

HEDRICK, Judge.

In her brief, plaintiff states that:

"The main thrust of the appeal is that the verdict should have been set aside as being inadequate and all assignments of error are directed to this contention."

By assignments of error numbers 5 and 6, plaintiff contends the court erred in "allowing and instructing the jury to correct their improper verdict," and in denying her motion to set aside the verdict for inadequacy. When the jury returned to the courtroom and announced that it had reached a verdict, the record discloses the following:

"THE COURT: Members of the Jury, here instead of a sum you have put in here 'Expenses for funeral, burial plot and ambulance, as cited in Court.' Now, I am aware that you didn't take notes, but the law would require that you answer that in a sum. If you like, I think we could probably stipulate as to what those sums are, could we not?"

EXCEPTION No. 32

COUNSEL: Yes.

Brown v. Moore

THE COURT: Who is the Foreman? You might come and take these Issues and you might add the sums up on the back, and then you may confer with your fellow Jurors to determine if that is your verdict, and if so, you may render it.

(To counsel): Gentlemen, will you stipulate that the expenses cited in Court were as follows: for funeral expenses: \$2,121.84; for plot, marker, and interment, \$612.00, and for ambulance, \$23.00?

COUNSEL: Yes.

THE COURT: If it is agreeable we will just allow them to take these Exhibits to the Jury Room in assisting them in arriving at their figure, if that is agreeable?

MR. BAKER: That is agreeable with us. They have been introduced.

MR. HENSON: That is agreeable with the defendant, Your Honor.

(The Jurors retired to the Jury Room with the Exhibits introduced at the trial.)

At 5:53 p.m., the Jury returned with its verdict as follows:

CLERK: Members of the Jury, you have agreed upon your verdict. You answer the First Issue, 'Yes'; the Second Issue, 'Yes'; and the Third Issue, 'Yes.' You answer the Fourth Issue in the amount of \$2,756.84; and the Fifth Issue, 'None.' This is your verdict, so say you all?

SEVERAL JURORS: Yes.

EXCEPTION No. 33"

[1, 2] It is well-settled in this State that a jury may correct an improper verdict. *Lumber Co. v. Lumber Co.*, 187 N.C. 417, 121 S.E. 755 (1924). It is equally well-settled that a motion to set aside a verdict for inadequacy is addressed to the sound discretion of the trial judge. *Hinton v. Cline*, 238 N.C. 136, 76 S.E. 2d 162 (1953). The record here discloses that the trial judge merely allowed the jury to correct an improper verdict on the issue of damages and that counsel for plaintiff assented to the procedure. Furthermore, on this record we cannot say

Golf, Inc. v. Wrecking Contractors

that the trial judge abused his discretion in refusing to set aside the verdict for inadequacy. These assignments of error are not sustained.

We have carefully considered all of plaintiff's assignments of error and find them to be without merit.

In the trial in the Superior Court, we find

No error.

Judges BRITT and CARSON concur.

MOORE GOLF, INC. v. SHAMBLEY WRECKING CONTRACTORS,
INC., AND THE NORTH RIVER INSURANCE COMPANY

No. 7418SC378

(Filed 17 July 1974)

Venue § 2— action by domesticated foreign corporation

The proper venue for an action instituted by a domesticated foreign corporation is the county where the corporation's registered office is located, not the county where the corporation has its principal place of business. G.S. 1-79.

APPEAL by defendants from *Kivett, Judge*, 10 December 1973 Session of Superior Court held in GUILFORD County. Heard in the Court of Appeals on 8 May 1974.

This civil action was instituted on 7 September 1973 by plaintiff, Moore Golf, Inc., a Virginia corporation. Plaintiff, pursuant to G.S. 55-138, is domesticated and duly licensed to do business in North Carolina with its registered office and agent being the C. T. Corp. System located in Durham, North Carolina. The defendants are Shambley Wrecking Contractors, Inc., (Shambley), a North Carolina corporation, and North River Insurance Co., (North River), a New Jersey corporation authorized and duly qualified pursuant to the General Statutes of North Carolina to engage in the business of writing various forms of insurance in this State. Defendant Shambley has its registered agent in Orange County while defendant North River maintains its main office in Durham County.

On 1 October 1973, defendants moved pursuant to G.S. 1-83 and G.S. 1-79 for a change of venue from Guilford County to

Golf, Inc. v. Wrecking Contractors

Orange County. On 11 December 1973, the court entered an order denying this motion, and in so doing stated, "[t]hat plaintiff is a resident in Guilford County and entitled to maintain this action in said county pursuant to G.S. Sec. 1-82; and that trial of this action in Guilford County will best serve the convenience of witnesses and the ends of justice."

The defendants appealed from the denial of their motion.

Smith, Moore, Smith, Schell & Hunter by Richard A. Leippe for plaintiff appellee.

Murdock & Jarvis by David Q. LaBarre for defendant appellants.

HEDRICK, Judge.

This appeal presents but one question: Did the trial court err in denying defendants' motion for a change of venue?

Defendants contend that a foreign corporation which duly domesticates in this State pursuant to G.S. 55-138(a) (5) is to be treated like a domestic corporation for venue purposes. G.S. 1-79 states: "For the purpose of suing and being sued, the residence of a domestic corporation is as follows: (1) Where the registered office of the corporation is located. * * *" Thus, based upon their contention that both domestic and domesticated foreign corporations are controlled by the same statute, the defendants maintain that the plaintiff improperly instituted this suit in Guilford County and should have brought the suit in the county where it has its registered office, namely, Durham County.

Plaintiff submits that, for purposes of venue, domestic corporations and domesticated foreign corporations should not be equated and that the present venue question is governed by G.S. 1-82. G.S. 1-82 provides, in pertinent part, as follows: "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement. . . ." Plaintiff asserts that the place of residence of a domesticated foreign corporation is controlled by a determination of where the party has its principal place of business. The parties do not dispute that Guilford County is the location of plaintiff's principal place of business; and plaintiff, relying mainly upon *Aetna Cas. & Surety Co. v. Petroleum Transit Co., Inc.*, 266 N.C. 756, 147 S.E. 2d 229 (1966) and

Golf, Inc. v. Wrecking Contractors

Crain & Denbo v. Harris & Harris Const. Co., 250 N.C. 106, 108 S.E. 2d 122 (1959), argues that Guilford County is the proper venue for the trial of this dispute.

Our Supreme Court has spoken on several occasions as to the treatment which is to be accorded domesticated foreign corporations. In each instance the court has determined that such corporations have the right to sue and be sued in the courts of this State under the rules and regulations which apply to domestic corporations. *Noland Co. v. Construction Co.*, 244 N.C. 50, 92 S.E. 2d 398 (1956); *Hill v. Greyhound Corp.*, 229 N.C. 728, 51 S.E. 2d 183 (1949); *Nutt Corp. v. R. R.*, 214 N.C. 19, 197 S.E. 534 (1938).

However, plaintiff, pointing to *Aetna Cas. & Surety Co. v. Petroleum Transit Co., Inc.*, *supra*, and *Crain & Denbo, Inc. v. Harris & Harris Const. Co.*, *supra*, disagrees with the general principle recited in the paragraph above, and argues that the cases he relies upon establishes the proper venue as the place where the domesticated foreign corporation maintains its principal place of business. The cases plaintiff cites do stand for the proposition which he would like for us to adopt in the instant case; however, we are of the opinion that both cases cited by plaintiff are distinguishable from the present case because they involve domesticated foreign *insurance* corporations. Dean Phillips has analyzed the domesticated foreign insurance corporation exception to the general rule that domesticated foreign corporations are treated like domestic corporations in the following manner:

“A foreign corporation which duly domesticates in this State is considered for venue purposes to be a domestic corporation. Therefore, the foreign corporation venue statute does not cover such corporations. * * * Under existing corporation law such foreign corporations must likewise specify and locate a registered office in this State upon domesticating, and it is solely to this formally specified location that the domestic corporation venue statute now refers residence.

“However, since there is no requirement that foreign insurance corporations locate a registered office upon domesticating in this State, it has been held that the domestic corporation act, dependent for determination of residence upon the formal specification of such a location, does not

State v. Cummings

apply. Instead, in this case [*Crain & Denbo, Inc., supra*], the court looked to the residual venue statute [G.S. 1-82], which provides that venue is proper in the county where any party resides, and held that such a corporation resides, in contemplation of general law, where it has its principal office or place of business." 1 McIntosh, North Carolina Practice and Procedure, (Phillips Supp.), § 815, pp. 145-146.

Therefore, since the plaintiff in the instant case is a foreign domesticated corporation with its registered office in Durham County, G.S. 1-79, *supra*, applies; and Guilford County, where the plaintiff has its principal place of business, is not the proper venue. Thus, for the reasons stated, the order of the trial court denying defendants' motion is reversed.

Reversed.

Judges BRITT and CARSON concur.

STATE OF NORTH CAROLINA v. WILSON CUMMINGS

No. 7412SC499

(Filed 17 July 1974)

1. Criminal Law § 64— opinion as to intoxication — inadequate opportunity to observe — harmless error

The trial court in a homicide prosecution erred in the admission of testimony as to defendant's sobriety at the time of the shooting where the record reveals that the witness did not have a sufficient opportunity to observe defendant; however, such error was rendered harmless by the testimony of other witnesses that they observed defendant on the night in question and were of the opinion that although he was drinking he was not drunk.

2. Criminal Law § 89— impeachment — prior crimes — question whether witness "charged, tried and convicted"

The solicitor was properly allowed to ask defendant's witness whether he had been "charged, tried and convicted" of certain crimes.

3. Criminal Law § 6; Homicide § 8— intoxication — effect on lesser degrees of homicide

The trial court properly charged the jury that defendant's intoxication had no bearing upon his guilt or innocence of the lesser included offenses in the charge of first degree murder since defendant's intoxication could only negate the specific intent necessary for first degree murder.

State v. Cummings

ON *certiorari* to review the trial of defendant before *Braswell, Judge*, 17 September 1973 Session of Superior Court held in CUMBERLAND County. Heard in the Court of Appeals 28 May 1974.

This is a criminal action wherein the defendant, Wilson Cummings, was charged in a bill of indictment, proper in form, with the murder of Glenn McArthur Smith. Upon arraignment, the defendant entered a plea of not guilty, and the State offered evidence which tended to establish the following:

On the evening of 3 May 1973, Glenn Smith, Henrietta Smith, Carol Cain, and Wilson Cummings were present at the Playboy Lounge in Fayetteville, North Carolina. The parties were talking and joking with each other when Carol Cain threw a beer can into the face of Glenn Smith. Smith retaliated by picking up the can and throwing it back at Carol, striking her in the face. The events which transpired thereafter are captured in the following testimony of Henrietta Smith:

"... Wilson Cummings then berated Carol Cain for throwing the can and said that he did not blame Glenn for throwing it back. But Carol Cain then told Wilson Cummings that she was just kidding and Cummings turned to Smith and said 'O.K., you S.O.B., you come around here and apologize or I will kill you.' That the defendant then reached into Carol Cain's pocketbook and got out a gun and pointed it at Glenn Smith and shot him. * * * That Wilson Cummings came around the bar and went outside. That as he left the bar, he had a pistol in his hand."

The State also offered the testimony of Dr. Charles Wells, an expert in the field of pathology, who testified that in his opinion "death was caused by shock and hemorrhage secondary to the gunshot wounds he had described."

The defendant offered evidence which tended to establish that he had been on a drinking "spree" for at least a day prior to the shooting of Smith and that at the time of the shooting the defendant did not know what he was doing because of his intoxicated condition.

From a verdict of guilty of second degree murder and a judgment that defendant be imprisoned for not less than twenty-five nor more than thirty years, defendant appealed.

State v. Cummings

Attorney General Robert Morgan by Assistant Attorney General George W. Boylan for the State.

Smith & Geimer, P.A., by William S. Geimer for the defendant appellant.

HEDRICK, Judge.

[1] Defendant, by his first assignment of error, contends that the trial court erred in admitting into evidence, over defendant's objection, the testimony of the witness Bieso as to defendant's sobriety at the time of the shooting. It is a well settled rule that a witness may give his opinion as to whether a person was drunk or sober on a particular occasion; however, such opinion testimony may not be admitted unless a proper foundation has been laid demonstrating that the witness was afforded sufficient opportunity to observe the individual who is the subject of his testimony. *State v. Dawson*, 228 N.C. 85, 44 S.E. 2d 527 (1947); *State v. Harris*, 213 N.C. 648, 197 S.E. 142 (1938); See, 1 Stansbury, N. C. Evidence (Brandis Revision), § 129, pp. 411-414.

The admission of the witness Bieso's opinion testimony was error as the record reveals that Bieso, who was a bartender at the Playboy Lounge on the night of the shooting, did not have a sufficient opportunity to observe the defendant. This error, however, was rendered harmless because several other witnesses testified, without objection by the defendant, that they observed defendant on the night in question and were of the opinion that although he was drinking he was not drunk. Thus, the testimony of Bieso was only cumulative in effect and its erroneous admission was not prejudicial.

[2] Next, defendant asserts that he was prejudiced by the form of certain questions asked his witness David Locklear upon cross-examination. The witness was asked whether he had been "charged, tried, and convicted" of speeding and driving under the influence, and whether he had been "charged, tried, and convicted" of forgery. The form of these questions was proper as "[f]or purposes of impeachment a witness may be asked whether he has committed specific criminal acts or been guilty of reprehensible conduct." *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). See also, 1 Stansbury, N. C. Evidence (Brandis Revision), § 112, pp. 342-346.

State v. Cummings

[3] Finally, the defendant argues that the trial court erred in charging that defendant's intoxication could have no bearing upon his guilt or innocence of the lesser included offenses in the charge of first degree murder. This contention is without merit. In *State v. Kelly*, 216 N.C. 627, 6 S.E. 2d 533 (1940), we find the following germane language:

"And the charge that if the jury found that these defendants were so drunk that they did not know or realize what they were doing, they would not be guilty of murder in the first degree but would be guilty of murder in the second degree has been approved in effect by this Court in the case of *S. v. Williams*, 189 N.C. 616-20. Here the Court approved the following charge in this regard: 'Drunk-
enness under the law is no excuse for crime and does not relieve the person of guilt for crime entirely. But in the case of murder, if a person is so intoxicated and rendered so insensible and so irrational by intoxication of any kind, or is naturally so weak-minded from natural cause that he cannot form an intent and cannot premeditate and deliberate, then it reduces the offense from murder in the first degree to murder in the second degree.'"

Thus, the defendant's intoxicated condition went only to negate the specific intent necessary to find him guilty of first degree murder and the trial judge in the instant case was correct in his statement in the charge as to the effect of a finding of defendant's intoxication upon the lesser included offenses of first degree murder.

The defendant was afforded a fair trial, free from prejudicial error.

No error.

Judges MORRIS and BAILEY concur.

Brown v. Gurkin

ANNA BROWN v. JOHN T. GURKIN, JOHN W. GURKIN

No. 742SC251

(Filed 17 July 1974)

Reformation of Instruments § 7— action to have deed declared deed of trust — insufficiency of evidence

Directed verdict was properly entered in favor of defendants in an action to have a deed reformed and declared a deed of trust where plaintiff neither alleged nor offered any evidence tending to show that a clause of redemption was omitted from the deed which she signed because of ignorance, mistake, fraud or undue advantage, and there was no evidence that plaintiff was prevented from ascertaining that the paper writing which she signed was a deed conveying the property to defendants with a life estate in the home reserved to her.

APPEAL by plaintiff from *Cohoon, Judge*, 13 November 1973 Session of Superior Court held in MARTIN County. Heard in the Court of Appeals 11 April 1974.

This is a civil action wherein the plaintiff, Anna Brown, seeks to have a deed, absolute on its face, reformed and declared a deed of trust.

The evidence at trial tended to show the following:

In 1965 James Brown, plaintiff's son, obtained a loan in the amount of \$3,000.00 from Wachovia Bank and Trust Company (Wachovia), said loan being secured by a deed of trust on land owned by plaintiff. Plaintiff's son was unable to satisfy the debt to Wachovia and the bank threatened to foreclose on the plaintiff's property. In order to prevent foreclosure, the plaintiff's son approached Mr. John W. Gurkin "about borrowing some money to pay off this farm note." The events which transpired thereafter are detailed in the somewhat confusing and contradictory testimony of the plaintiff.

"No, sir, I don't remember the date of the month it was, neither of the year Mr. Gurkin came by to bring me to Williamston to sign a deed. Yes, he came to my house Mr. Gurkin's son and took me uptown. * * * Yes, I went up there because that is where he wanted me to sign the paper.

Yes, to sign some papers. I guess it was a deed. He told me he wanted me to sign a deed. I call it a paper. Yes, I went with him in a car, I think. No, sir, no one else on

Brown v. Gurkin

the car. No, sir, I did not know what I was signing. I certainly did not. No, I had not asked Mr. Gurkin for any money to take up the place. I don't think Mr. Gurkin came but once to my house. Right that was the time he took me uptown.

I didn't tell him anything that I know of what I wanted to do—I wanted my home back. I rode uptown with him to sign the paper with him. No, he didn't tell me what kind of paper it was. If he did I forgot what he said about the paper, what kind it was.

I was 75 or 80 or 90 years old, along in there, because they say I am 80 now. I said 75 or 80 at the time he took me uptown. No, Mr. Gurkin did not explain what the paper was. Of course, I looked at the paper when I was signing it. No, sir, I didn't know what I was signing. I don't believe there was nobody in there but myself and Mr. Gurkin, and the one doing the writing. I don't believe there was. After I signed the paper Mr. Gurkin didn't tell me anything only we got ready and come on back home.

He didn't give me anything, but his father, before I left home, his father gave me \$20.00. Mr. Gurkin took me home. Yes, same one carried me brought me back. No, sir, I have not learned since what that paper was that I signed. I did not know the paper was a deed.

No, sir, I never asked Mr. Gurkin for any money. No, sir, I did not. No, sir, I did not want to sell my place at the time. No, sir, I had never approached Mr. Gurkin about selling my place. Yes, I now know the paper I signed was a deed, but I didn't know it then."

While on cross-examination of the plaintiff, the record discloses:

"Q. It was understood between you and him at the time . . .

OBJECTION. OVERRULED.

that you could live in that house as long as you lived, there would be a life estate preserved in that house for you, wasn't it?

A. Yes, sir, life estate. Yes, this was understood by me. Yes, sir, I knew it was a deed. Right that is the reason

Brown v. Gurkin

I later went to him about buying it back. No. Mr. Johnny Gurkin did not give me four fifty dollar bills. If he did I don't remember. No, sir, I certainly don't, my memory is short"

At the conclusion of the plaintiff's evidence, the defendants moved for a directed verdict, and this motion was granted. The plaintiff appealed.

Milton E. Moore and Regina Moore for plaintiff appellant.

Griffin & Martin by Clarence M. Griffin for defendant appellees.

HEDRICK, Judge.

The only question presented on this appeal is whether the Court erred in directing verdict for the defendants.

It is well-settled in this State that in order to reform a deed, absolute on its face, into a mortgage or security for a debt, it must be alleged and proven that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage. This must be established by proof of declarations and proof of facts and circumstances, *dehors* the deed, inconsistent with the idea of an absolute conveyance. *Isley v. Brown*, 253 N.C. 791, 117 S.E. 2d 821 (1960); *Perkins v. Perkins*, 249 N.C. 152, 105 S.E. 2d 663 (1958).

In *Harris v. Bingham*, 246 N.C. 77, 97 S.E. 2d 453 (1957), Parker, J., later C.J., quoting from *Harrison v. R. R.*, 229 N.C. 92, 47 S.E. 2d 698 (1948), said:

"The duty to read an instrument or to have it read before signing it, is a positive one, and the failure to do so, in absence of any mistake, fraud, or oppression, is a circumstance against which no relief may be had, either at law or in equity." See also, *Williams v. Williams*, 220 N.C. 806, 18 S.E. 2d 364 (1941).

In the present case, the plaintiff neither alleged nor offered any evidence tending to show that the clause of redemption was omitted from the deed, which she signed, because of ignorance, mistake, fraud, or undue advantage. There is no evidence in this record tending to show that plaintiff was prevented in any way from ascertaining that the "paper" which she was signing

Eggimann v. Board of Education

was a deed conveying the property to the defendants with a life estate in the home reserved to her.

When evidence in this case is considered in the light most favorable to the plaintiff and all contradictions and conflicts in plaintiff's testimony are resolved in her favor, we are of the opinion that Judge Cohoon was correct in directing a verdict for defendants.

The judgment is

Affirmed.

Judges BRITT and CARSON concur.

PETER EGGIMANN, RACHEL PAIR, JOHN T. MASSEY, JR., SHELTON V. BRIDGERS, AND JACKIE AMMONS, ON BEHALF OF THEMSELVES AND ALL OTHER RESIDENTS, PROPERTY OWNERS, AND TAXPAYERS OF THE VAIDEN WHITLEY CONSOLIDATED HIGH SCHOOL ATTENDANCE AREA OF EASTERN WAKE COUNTY, PLAINTIFFS v. WAKE COUNTY BOARD OF EDUCATION, A BODY CORPORATE, AND THE INDIVIDUAL MEMBERS THEREOF, MARY GENTRY, CHAIRMAN, ED HALES, CLYDE KEISLER, ROLAND DANIELSON, AND SAMUEL RANZINO

No. 7410SC322

(Filed 17 July 1974)

1. Injunctions § 4; Schools § 4— school board — violation of open meetings law — failure to grant permanent injunction

The trial court did not err in failing permanently to enjoin a school board from violating the N. C. Open Meetings Law, G.S. 143-318.1 *et seq.*, where the case was heard on a motion for summary judgment, the evidence was conflicting as to whether a certain person had been excluded from one board meeting, an injunction would be ineffective since any secret meetings held by the board were accomplished facts, and any person excluded from a meeting required to be open was given a remedy by G.S. 143-318.6.

2. Schools § 9— site selection — private meetings by school board

School board's selection of a site for a comprehensive high school was not void by reason of private meetings held by the board at which the site selection was discussed where several open meetings with respect to site selection were held by the board and the final decision on the site was made by the board at an open meeting.

3. Schools § 9— site selection — private meetings — constitutional rights of residents

Secret meetings of a school board at which the selection of a school site was discussed did not violate the constitutional rights of

Eggimann v. Board of Education

due process and equal protection of residents of the school attendance area.

4. Schools § 9— site selection— delegation of authority to agent— absence of issue of material fact

In this action to set aside a school board's selection of a school site, no genuine issue of material fact existed with respect to plaintiff's contention that the school board had unlawfully delegated its authority to pick the school site to an agent.

APPEAL by plaintiffs from *Bailey, Judge*, 28 January 1974 Session, Superior Court, FRANKLIN County. Heard in the Court of Appeals 29 May 1974.

This action was originally instituted on 30 November 1973, against the individual members of the Wake County Board of Education. Upon defendants' motion, the action was dismissed as to the original defendants but, upon plaintiffs' motion, plaintiffs were allowed to amend their complaint to make the Wake County Board of Education, a body corporate, a defendant. Amended complaint was filed on 4 January 1974, alleging: That, upon information and belief, the defendant School Board had unlawfully delegated its authority to pick a school site to an agent; that the defendant held a series of secret meetings, in violation of the law, to pick a school site; that the Board had prevented plaintiffs and others similarly situated from being heard at Board meetings and had denied plaintiffs access to the private meetings held in selecting the school site and more particularly from a private meeting held on 19 November 1973. In their prayer for relief plaintiffs asked that defendant's action in selecting the Yancey Farm as a site for the location of a high school be declared null and void, that defendant be perpetually enjoined from violating North Carolina's Open Meetings Law, and that defendant be enjoined from unlawfully delegating its authority to an agent. Neither a restraining order nor a temporary injunction was requested. Plaintiffs' complaint was unverified.

Defendant, in apt time, filed a verified answer and motion for summary judgment supported by affidavits from members of the Board, the staff employed by the Board, and others. Plaintiffs filed opposing affidavits from one of plaintiffs, Shelton V. Bridgers, and from a former member of the Board, James S. Buchanan.

The motion was heard upon the pleadings and affidavits. The court found that on 19 November 1973 and at times prior

Eggimann v. Board of Education

thereto, the Board had held meetings of which neither the public nor the press was notified, and that the Board conceded that for the purpose of determining whether summary judgment should be granted, Shelton Bridgers was excluded from a meeting held on 19 November 1973, but that defendant's final and official action in selecting a school site on 19 November 1973 was at a public meeting; that the G. W. Yancey homeplace was, by resolution unanimously adopted at said public meeting, chosen as a site for the new school; that attempts were made to interrupt the meeting at which final action was taken; that tape recordings of the open meetings on 24 October 1973, 7 November 1973, and 19 November 1973, were subpoenaed by plaintiffs for the hearing, were produced by defendant, but were not offered in evidence nor was any request with respect thereto made by plaintiffs; that there is no allegation of abuse of discretion in the selection of the G. W. Yancey homeplace as the site for the school. On these undisputed material facts, the court concluded (1) that the final selection of a school site is not a matter requiring defendant to conduct "mass meetings or hearings", (2) "[t]hat neither the Wake County Board of Education nor any other governmental body is required by law to tolerate disruptions of its meetings by the public, either in mass or by individuals", (3) "[t]hat, conceding for the purposes of this hearing, the Wake County Board of Education acted improperly and improvidently in attempting to conduct business at a time and place not generally known by or available to the public, its action in selecting a school site in the Wendell-Zebulon area on November 19, 1973, was not void", and (4) "[t]hat while the Court would entertain an action seeking a permanent injunction to restrain the Board from holding such meetings in the future, this matter coming before the Court on a motion for summary judgment, and the Court finding that no disputed fact exists which entitles plaintiffs to the relief prayed for in the complaint, the action of the plaintiffs should be dismissed." Plaintiffs excepted to the signing and entry of the judgment and appealed.

Kirk, Ewell, Goodman and Tantum, by Clarence M. Kirk, for plaintiff appellants.

Mordecai and Mills and Davis, Davis and Debnam, by F. Leary Davis, Jr., for defendant appellee.

Eggimann v. Board of Education

MORRIS, Judge.

Upon their sole exception to the signing and entry of the summary judgment, plaintiffs base their four assignments of error.

[1] Plaintiffs, by their first assignment of error, argue that the court erred in failing to grant the permanent injunction prayed for. We do not agree. We note that the judgment provides that defendant concedes, *for the purpose of determining whether summary judgment should be granted in this action*, that Shelton Bridgers was excluded from a meeting held on 19 November 1973. The evidence as to this point is conflicting. However, even had this been a hearing on a show cause order, after the granting of a motion for a preliminary injunction, and the court had found such a fact from the evidence, it would not have been binding on the court on final hearing. *Branch v. Board of Education*, 230 N.C. 505, 53 S.E. 2d 455 (1949). Plaintiffs, however, had not asked for a preliminary injunction or mandatory restraining order and there had been no show cause hearing. This was a hearing on a motion for summary judgment. In addition, assuming that Bridgers had been excluded from the meeting of 19 November 1973 and assuming that the Board had held secret or private meetings in violation of the statute, these were accomplished facts and "cannot be prevented or redressed by the issuance of the injunction prayed for." *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 452, 168 S.E. 2d 401 (1969); *Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967); *Branch v. Board of Education*, *supra*. Furthermore, the general rule is that when the right to injunctive relief depends upon statutory provisions, the question of whether an injunction should be granted is to be determined by the statute in force at the time the relief, if any, is to be awarded. 42 Am. Jur. 2d, Injunctions, § 8, p. 735. Plaintiffs have classified their action as a class action. They seek injunctive relief under a statutory provision, arguing that Article 33B of Chapter 143, General Statutes of North Carolina, provides that it is the public policy of this State that all hearings and actions of any governing and governmental bodies be open. With this we agree. We point out, however, that G.S. 143-318.6, entitled "Mandamus and injunctive relief", specifically provides:

"Any citizen denied access to a meeting required to be open by the provisions of this Article, in addition to other

Eggimann v. Board of Education

remedies, shall have a right to compel compliance with the provisions of this Article by application to a court of competent jurisdiction for restraining order, injunction or other appropriate relief." (Emphasis added.)

Plaintiffs' evidence was that if anyone had been excluded from any meeting it was Shelton V. Bridgers only. The evidence as to his exclusion was disputed but the point was conceded by defendant for purpose of summary judgment. We are of the opinion that the provisions of G.S. 143-318.6 were intended to apply only to a situation where a citizen has been refused access to a meeting required to be open. Shelton V. Bridgers had a remedy under the statute, if he could prevail upon the evidence. He chose not to use it. We do not discuss whether the statute has any application with respect to future or further violations. That question is not before us. This assignment of error is overruled.

[2] By their second assignment of error, plaintiffs contend that the court erred in refusing to declare void the action of the Board in selecting a site.

"(Upon a motion for summary judgment), [b]oth the opposing and moving parties are entitled to any presumption that is applicable to the facts before the Court. Moore's Federal Practice, 2d Vol. 6, § 56.15(3), p. 2343."

The provisions of G.S. 115-31 clearly provide for a presumption of correctness as to any order or action of the Board in all actions brought in any court against a county or city board of education. The statute further places the burden of proof on the complaining party to show otherwise.

The court found that the facts set out in the judgment were undisputed. Our study of the record confirms this. Plaintiff does not argue otherwise except to say that the real decision to select the Yancey homeplace was made in secret session on 19 November 1973 and the later meeting was only a ratification. The fact remains that the record, by undisputed evidence, discloses that at an open meeting held on 24 October 1973, the Board voted unanimously to select a school site for the establishment of a comprehensive high school in the vicinity of Lizard Lick, as nearly equal distance as possible from the towns of Wendell and Zebulon; that at times prior to and on 19 November 1973 the Board had met at the office of the Superintendent of Wake County Schools at meetings of which neither the press nor the

Eggimann v. Board of Education

public had had notice and at which no members of the public or press were present; that at such a meeting on 19 November 1973, and at prior similar meetings, the Board had considered matters on the agenda for meetings to be held in public immediately thereafter and that members of the staff of the Board had been available to answer questions in order to clarify matters coming before the Board at the subsequent open meeting, and that at the 19 November 1973 meeting the members did discuss the prospective action relating to the school site selection; that in an open meeting on 19 November 1973, at which Shelton V. Bridgers, other members of the public, and the media were present, the Board took final action concerning the selection of a school site by unanimously adopting a resolution selecting the G. W. Yancey homeplace as the site for the establishment of a comprehensive high school and directing the Chairman and Executive Officer of the Board to proceed to acquire the property from its owners. The undisputed evidence showed further as found by the court that attempts were made to interrupt the open meeting at which the site was selected; that tape recordings were made of both the 24 October and the 19 November meetings, subpoenaed by plaintiffs, produced by defendant at the summary judgment hearing, but plaintiffs did not offer them in evidence. The court stated in its findings that plaintiffs do not allege abuse of discretion on the part of the Board in selecting the Yancey homeplace as the site for the establishment of the school.

Based on the undisputed facts, which leaves no material fact in dispute, we are of the opinion that the court did not err in concluding that the action of the Board in selecting a school site on 19 November 1973 was not void. We do not reach and, therefore, do not discuss the question of whether the selection of a site for a school is acquisition of property for which purpose any of the bodies to which Article 33B applies may meet in executive session and exclude the public.

[3] Plaintiffs next contend that the court should have concluded that the fact that the Board had held secret meetings constituted a violation of plaintiffs' constitutional rights of due process and equal protection of the laws. Plaintiffs cite no authority for this novel contention, and we see no merit in it. The undisputed facts are that the public was heard with respect to the site selection on several occasions. Plaintiffs' argument that the court failed to find facts with respect to this is certainly not well founded. It is not, as we have repeatedly pointed out,

State v. Willis

the province of the court to find the facts upon a motion for summary judgment. Its province is to determine whether there are genuine issues of material fact in dispute. Here the court merely entered an order summarizing the undisputed material facts upon which the judgment was based. The undisputed facts are determinative of the questions raised in this case.

[4] By their last assignment of error plaintiffs contend that the court failed to find facts with respect to the Board's delegating its authority to an agent. What we said above with respect to fact finding upon a motion for summary judgment is equally applicable here. The complaint, which was not verified, alleged no facts with respect to this contention nor did plaintiffs' affidavits contain any facts. The only facts in the record were that the Board selected the site; that Mr. Davis was employed by the Board to assist its retained counsel solely because the Board's retained counsel was ill and his wife was critically ill but that Mr. Davis was never authorized by the Board and never did select a site. These undisputed facts together with the undisputed fact that the Board actually selected a site at the public meeting of 19 November 1973, make it abundantly clear that no genuine issue of material fact exists with respect to this contention.

For the reasons stated, the judgment of the trial tribunal is, in all respects, affirmed.

Affirmed.

Judges HEDRICK and BALEY concur.

STATE OF NORTH CAROLINA v. HENRY WILLIS, JR., AND TYRONE WILLIAMS

No. 7426SC495

(Filed 17 July 1974)

1. Criminal Law § 116— charge on defendants' failure to testify — *lapsus linguae*

Trial court's erroneous instruction that the failure of defendants to testify "is to be regarded to their prejudice in any respect" was a mere *lapsus linguae* which did not prejudice defendants.

State v. Willis

2. Criminal Law § 116— charge on defendants' failure to testify — absence of request

While it is the better practice to give no instruction on the failure of defendants to testify absent a request therefor, there is no error in giving an unrequested instruction if it correctly states the law.

3. Robbery § 4— uncertainty of identification testimony — sufficiency of evidence for jury

In an armed robbery prosecution, the State's evidence of the identity of one defendant as one of the robbers was sufficient for the jury even though the victim testified that he did not see the features of such defendant's face and that he was unable to identify him without the aid of a jacket and hat allegedly worn by one of the robbers.

4. Criminal Law § 128— motion for mistrial — statement to victim's wife

The trial court in an armed robbery prosecution did not err in the denial of defendant's motion for mistrial based on an extrajudicial statement of a young girl to the victim's wife that the girl had had a baby by the defendant.

5. Criminal Law § 128— motion for mistrial — jury hearing verdict in prior case

The trial court did not err in the denial of a motion for mistrial made on the ground that the jury was allowed to hear the jury in a previous case render its verdict.

APPEAL from *Falls, Judge*, 7 January 1974 Session of MECKLENBURG County Superior Court. Heard in the Court of Appeals 12 June 1974.

Both defendants were charged in valid bills of indictment with the armed robbery of Wilbert Brown. Brown's testimony at trial tended to show that two men approached him on the street, pointed pistols at him, and took his wallet. On voir dire, Brown testified that he got a good look at defendant Williams during the robbery. He was able to observe that defendant Willis was brown-skinned and that he was wearing a big wide-brimmed hat and a black jacket, but that he did not notice his facial features. After the police had arrested defendants, Brown was taken to a service station where he confronted defendants. He identified Williams immediately, and he identified Willis after he had put on a hat and coat taken from the police vehicle. In response to a question of the court, Brown testified that his identification of defendants was not influenced by anything that happened after the robbery. At the conclusion of voir dire, the court made the following findings of fact and conclusions of law:

" . . . Based upon the evidence presented on voir dire with respect to the identification, the court finds as a fact that

State v. Willis

approximately thirty minutes after the alleged robbery, the police informed the prosecuting witness that they had three male blacks that they would like for him to see, that he met them at the Tenneco Service Station on Barringer Drive and Clanton Road, that he met the officers there and a black male was taken out of an automobile and the prosecuting witness said he was not one of the persons who robbed him, that another black male was taken from the police car and the prosecuting witness asked if he had a hat and a black jacket. . . .

A black hat and black jacket, that the police got a black hat and black jacket out of their police car and placed the articles on the black male that was taken from the police car, after which time the prosecuting witness positively identified this subject as one of the persons who robbed him; that another black male was taken from the car and the prosecuting witness identified him immediately as being the person who stood in front of him and robbed the prosecuting witness;

That the police did not suggest anything to influence the identification made by the prosecuting witness at the time. No statement was made by the police to assist or influence the prosecuting witness in the identification of the two defendants, Willis and Williams. Based upon the foregoing, the court concludes that the identification of this witness of the two defendants was not tainted by anything other than his recognition of the two defendants as being the ones that he saw get out of a Maverick or Pinto automobile on Barringer Drive and walk along the sidewalk opposite him before crossing over to his side of the street where the robbery took place."

Officer Eberhardt of the Charlotte Police Department testified that he first approached defendants when they were inside an automobile. He saw a black hat in the back seat with a pistol protruding. Officer Eberhardt thereupon called for another patrol car and got a description of the suspects in the armed robbery. Officer Eberhardt arrested defendants, and he took them to the service station where they were identified by Brown. Two pistols were seized from the vehicle in which defendants were seated when arrested, and Brown identified them as being the pistols involved in the robbery.

State v. Willis

At the close of State's evidence, motion for nonsuit was denied as to both defendants. In addition, the court denied motions for mistrial made by counsel for both defendants.

After instructing the jury that neither defendant had offered testimony, and neither was required to do so, the court instructed as follows:

"He may offer witnesses or not, just as he sees fit, *and the fact that neither Willis nor Williams offered testimony is to be regarded by you to their prejudice in any respect.* The burden is on the State of North Carolina from the beginning to the end of this trial." (Emphasis added.)

The jury returned a verdict of guilty as to each defendant. From the signing and entry of judgment, both defendants appealed.

Attorney General Morgan, by Associate Attorney John R. Morgan, for the State.

Arthur Goodman, Jr., and Howard J. Greenwald for defendant Willis.

J. Reid Potter for defendant Williams.

MORRIS, Judge.

Both defendants assign error to the above quoted portion of the court's instruction to the jury. It is elementary that the law is that the jury is *not* to infer guilt from the fact that the defendant neither testifies nor presents evidence. G.S. 8-54. Whether by error of the reporter or inadvertence of the court, the record before us clearly shows an erroneous instruction that,

"The fact that neither Willis nor Williams offered testimony is to be regarded to their prejudice in any respect."

The court further instructed that, "The burden is on the State of North Carolina from the beginning to the end of this trial." The court had previously instructed that the defendants were not obligated to offer testimony or to establish their innocence. He further instructed that defendants were presumed innocent, and they could elect whether to take the stand.

[1, 2] Thus, it appears that the erroneous instruction was a mere slip of the tongue, and that the court intended to say, "(the failure to testify) is *not* to be regarded to their prejudice." A

State v. Willis

lapsus linguae in the instruction will not be held to be prejudicial error if not called to the attention of the court and if it does not appear that the jury could have been prejudiced thereby. *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), cert. denied, 386 U.S. 911.

“The charge to the jury must be considered as a whole, in the same way connected as given to the jury with the presumption that the jury did not overlook any portion of it and if, when so construed, it presents the law fairly and correctly, there is no ground for reversal, although some of the expressions, when standing alone, may be regarded as erroneous.” *State v. Humphrey*, 13 N.C. App. 138, 142, 184 S.E. 2d 902 (1971).

Defendants further contend that it was error for the court to instruct—absent request—on their failure to testify. While it is the better practice to give no instructions in such a case, there is no error in giving an unrequested instruction if it correctly states the law. *State v. Potter*, 20 N.C. App. 292, 201 S.E. 2d 205 (1973).

[3] We cannot sustain defendant Willis’ contention that his motion for nonsuit should have been granted on the ground that no competent evidence tended to show that he was one of the robbers. This position is grounded on the uncertainty of Wilbert Brown’s identification of Willis. On voir dire the court made findings of fact based on competent evidence and ruled that the identification was not tainted. Defendant Willis brings forward no exception to this ruling. The testimony of Brown that he did not see the features of Willis’ face and that he was not able to identify Willis without the aid of a jacket and a hat bears only on the weight, not the admissibility of the testimony. *State v. Bridges*, 266 N.C. 354, 146 S.E. 2d 107 (1966). Under the well-established test for nonsuit, the evidence against defendant Willis was ample for the jury.

[4] Defendant Willis assigns error to the denial of his motion for mistrial. It is his contention that he was prejudiced by an extra-judicial statement of a young girl to Mrs. Wilbert Brown that, “She had a baby by Henry Willis and she said that her mother knew my husband and she wanted him to call her.” Defendant contends that without this testimony, the jury would have had a reasonable doubt as to the guilt of Willis. As we have stated, the testimony of Wilbert Brown identifying Willis

Proctor v. Weyerhaeuser Co.

as his assailant is sufficient for submission to the jury. The extra-judicial statement does not strengthen the State's position relative to the sufficiency of the evidence. Even if the admission of this evidence be error, defendant has not shown that he was prejudiced. This assignment of error is therefore overruled.

[5] Defendant Williams likewise assigns error to the denial of his motion for mistrial. He contends that he was prejudiced by the fact that the jury was allowed to hear another jury render its verdict in a previous case. Defendant has neither shown prejudice nor offered authority. We therefore overrule this assignment of error.

No error.

Judges BRITT and BAILEY concur.

JOSEPH E. PROCTOR v. WEYERHAEUSER COMPANY

No. 741SC119

(Filed 17 July 1974)

1. Negligence § 34— injury while unloading logs — contributory negligence — sufficiency of evidence

Evidence in a personal injury action did not compel the conclusion that plaintiff was contributorily negligent where it tended to show that plaintiff was gathering a chain which he had just removed from a load of logs being delivered to defendant when an employee of defendant rammed the forks of an unloader under the logs causing the uppermost logs of the load to fall and strike plaintiff.

2. Damages § 16— future damages — failure to instruct — no error

While it would not have been improper for the trial court in a personal injury action to charge that plaintiff could not recover for future consequences of his injury, such a charge was not necessary since all the evidence was of past injury.

APPEAL by defendant from *Fountain, Judge*, 18 June 1973
Civil Session of Superior Court held in PERQUIMANS County.

Plaintiff instituted this action to recover damages of \$60,674 or "some other large sum" for injuries received due to the alleged negligence of defendant's agent. Defendant answered, pleading the affirmative defense of contributory negligence.

Proctor v. Weyerhaeuser Co.

Issues of negligence, contributory negligence and amount of damages were submitted to the jury, who answered the first in the affirmative, the second in the negative, and awarded damages of \$20,000. Defendant appeals, assigning error.

Twiford, Abbott and Seawell, by Russell E. Twiford and John G. Trimpi, for plaintiff appellee.

Leroy, Shaw, Hornthal & Riley, by L. P. Hornthal, Jr., for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the trial court to grant its motions for directed verdict and judgment notwithstanding the verdict, and portions of the court's instructions to the jury.

[1] By its first assignment of error defendant contends that plaintiff was contributorily negligent as a matter of law. In *Simmons v. Williams*, 20 N.C. App. 402, 404, 201 S.E. 2d 561, 562-563 (1974), we find: "As to contributory negligence of the plaintiff as a matter of law, a verdict may be directed on the basis of contributory negligence 'only when the plaintiff's evidence . . . so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference or conclusion can be drawn therefrom.' *Anderson v. Carter*, 272 N.C. 426, 429, 158 S.E. 2d 607, 609; *accord*, *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47; *Miller v. Enzor*, 17 N.C. App. 510, 195 S.E. 2d 86, *cert. denied*, 283 N.C. 393, 196 S.E. 2d 276. In determining whether a directed verdict should be granted, the evidence must be viewed in the light most favorable to plaintiff. *Bowen v. Gardner, supra*; *Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E. 2d 329. Contradictions and inconsistencies in plaintiff's evidence must be resolved in his favor. *Bowen v. Gardner, supra*; *Waycaster v. Sparks*, 267 N.C. 87, 147 S.E. 2d 535; *Carter v. Murray*, 7 N.C. App. 171, 171 S.E. 2d 810." So viewed, the evidence tends to show:

On 27 January 1969, plaintiff was engaged in the logging business, selling his logs to defendant. On the morning of that day, plaintiff's son loaded twenty to twenty-two logs in pyramid fashion onto a specially designed ten-wheel Chevrolet truck. The logs were loaded on bolsters on top of the chassis. These bolsters were six inches high with a two-inch thick piece of oak

Proctor v. Weyerhaeuser Co.

on top of each. Extending upward from the bolsters were standards, approximately four feet in length, to contain the logs. The logs, on the day in question, were stacked in such manner that the top two layers were higher than the standards but were secured by chains. Two chains, twenty-two feet in length, were used to encircle the logs but not the chassis. A chain was placed behind each bolster and the ends fastened together on the right-hand side of the truck by a steel binder. That morning, plaintiff drove to the defendant's mill in Lewiston, first stopping at scales to get his truck weighed and then going to the unloading deck. Plaintiff stopped at the deck, got out of his truck, went around the front and proceeded to the back right-hand side to release the back chain. After throwing one end of the chain over the logs, he pulled it under the logs and placed it in a box built into the chassis behind the front bolster.

At this point a Mr. Wrightson approached plaintiff and asked him to measure some of the logs on the truck. This they did on the left-hand side of the truck. As plaintiff finished measuring the logs, Jasper Taylor, employee of defendant, turned his Pettibone unloader from the job he had just completed to plaintiff's truck so that plaintiff had to run out of his way. Plaintiff, in so doing, threw up his hand and said, "Stop." The machine did stop about eighteen inches from the truck.

Plaintiff, then on the left-hand side, walked around the truck, released the binder of the remaining front chain, threw the free end over and started pulling the chain under the logs and gathering it. At this point, Taylor activated the unloader, ramming the forks of the machine under the logs causing the uppermost logs to fall off the truck and strike plaintiff.

The evidence does not compel the conclusion that plaintiff was negligent, therefore, this assignment of error is overruled.

[2] Defendant's second assignment to various parts of the charge contains three contentions. The first two clearly are without merit. Defendant's third contention is that the court erred in refusing to give a requested instruction to the effect that plaintiff could not recover for future consequences of his injury. This contention is based upon the lack of any medical testimony that plaintiff was under any continuing disability. This is true and, in fact, there is *no* evidence of a continuing disability. The trial court correctly instructed upon recovery for loss of earnings or loss of capacity to earn, fair and reasonable value of

State v. Harrington

medical expenses, and pain and suffering. See *King v. Britt*, 267 N.C. 594, 148 S.E. 2d 594 (1966). While it would not have been improper to charge that no future damages could be awarded, such a charge was not necessary since all the evidence was of past injury.

No error.

Chief Judge BROCK and Judge BAILEY concur.

STATE OF NORTH CAROLINA v. JAMES BOBBY HARRINGTON

No. 748SC528

(Filed 17 July 1974)

1. Criminal Law §§ 75, 162— admissibility of defendant's statements — no voir dire — failure to object in trial court

Where defendant did not object at trial to the admission of certain statements made by him to arresting officers, he cannot, upon appeal, raise the issue that the court erred in failing to hold a *voir dire* examination to determine voluntariness of the statements.

2. Homicide § 30— second degree murder — failure to submit lesser included offenses

In a second degree murder prosecution where the State's evidence tended to establish second degree murder, but defendant's evidence tended to show accident or misadventure, the trial court properly instructed on accident and properly failed to instruct on the lesser included offenses of voluntary manslaughter and involuntary manslaughter.

ON *certiorari* to review order of *Canaday, Judge*, 30 July 1973 Session of Superior Court held in WAYNE County.

Defendant was tried upon a bill of indictment charging him with the first-degree murder of Willie Mae Evans on 24 March 1973. In open court the assistant district attorney announced that the State elected to try defendant only for second-degree murder or such lesser included offenses as the evidence might justify. The court instructed the jury that they could return either a verdict of guilty of murder in the second degree or not guilty. The jury returned a verdict of guilty of second-degree murder and the court entered judgment sentencing defendant to a prison term of not less than twenty-five nor more than

State v. Harrington

thirty years. Defendant was given credit for 138 days spent in jail awaiting trial.

Attorney General Robert Morgan, by Assistant Attorneys General James E. Magner, Jr., and Claude W. Harris, for the State.

Baddour and Lancaster, by Philip A. Baddour, Jr., for defendant.

BRITT, Judge.

[1] Defendant first assigns as error the court's admitting into evidence certain statements made by him to the arresting officers, without first conducting a *voir dire* examination to determine their voluntariness. The assignment has no merit.

The record discloses that defendant made no objection to the testimony now challenged. In *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), our Supreme Court quoted with approval from 29 Am. Jur. 2d, Evidence § 583, as follows: "Where no proper and timely objection to the voluntariness of a confession is made, or no request is made for an examination as to its voluntariness, no preliminary examination or hearing is required with respect to such question, and the defendant cannot, upon an appeal, raise the issue that the court erred in failing to conduct such a preliminary examination."

Defendant's second assignment of error is to the denial of his motion for judgment as of nonsuit. We have carefully reviewed the evidence and concluded that it was more than sufficient to survive the motion. The assignment is overruled.

Defendant's third assignment of error relates to a portion of the jury charge. We have thoroughly considered this assignment and find it to be without merit.

[2] Defendant's fourth assignment concerns the failure of the court to instruct on the lesser included offenses of voluntary and involuntary manslaughter. This assignment is without merit.

The trial court is not required to charge on lesser degrees of the crime charged when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971). Pertinent evidence in favor of the State tended to show: Defendant, his wife, his brother, and the victim (Evans) were at the mobile home of

State v. Harrington

the defendant drinking liquor. While defendant and his brother were talking in the living room, Evans and defendant's wife were working in the kitchen. During the course of the period of time in question, defendant got his rifle and loaded it. Thereafter, defendant and his brother left the home to get more liquor. Returning, they resumed their drinking. A little later defendant, without warning, grabbed the rifle and pointed it at his brother, saying, "I'll shoot you." Evans came to the kitchen door and told defendant not to shoot, at which point defendant then shot Evans three times, killing her.

Defendant stipulated that Evans died as a result of being shot three times with a .22 caliber rifle, the first bullet striking her in her left upper chest, and the second and third bullets striking her in her abdomen; that the first bullet was lethal in that it struck a portion of her heart.

As a witness for himself, defendant testified that he had started out of the trailer with his rifle to shoot targets when someone called; that he returned to the kitchen where Evans was, stumbled over a chair, and the rifle discharged, hitting her.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. 4 Strong N. C. Index 2d, Homicide § 5, p. 197. A presumption of malice arises from a killing which results from the intentional use of a deadly weapon. *State v. Johnson*, 278 N.C. 252, 179 S.E. 2d 429 (1971). Evidence presented by the State in the instant case tended to establish murder in the second degree.

Defendant's evidence tended to show accident or misadventure. In *State v. Faust*, 254 N.C. 101, 112, 118 S.E. 2d 769, 776 (1961), we find:

"Where the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer. Where it appears that a killing was unintentional, that the perpetrator acted with no wrongful purpose in doing the homicidal act, that it was done while he was engaged in a lawful enterprise, and that it was not the result of negligence, the homicide will be excused on the score of accident.' 26 Am. Jur., Homicide, s. 220, p. 305. The negligence referred to in the foregoing rule of law has been declared by

Browne v. Dept. of Social Services

this Court to mean something more than actionable negligence in the law of torts. It imports wantonness, recklessness or other conduct, amounting to culpable negligence. (Citations.)”

The trial court fully instructed the jury on the question of accident or misadventure, specifically charging that if they were satisfied that defendant shot Evans by accident, it would be their duty to return a verdict of not guilty.

We hold that there was no evidence to sustain a verdict of manslaughter or involuntary manslaughter, therefore, the court did not err in failing to submit those offenses as alternative verdicts.

No error.

Judges CAMPBELL and PARKER concur.

MARY ELIZABETH BROWNE, PETITIONER v. CATAWBA COUNTY DEPARTMENT OF SOCIAL SERVICES, VILLARD C. BLEVINS, SHEILA S. COULTER, SYBIL GOOD, AND JERRY EVANS, RESPONDENTS, IN THE MATTER OF THE CUSTODY OF ANGELA RUTH CHURCH, AGE SEVEN, AND EARL CLIFFORD CHURCH, AGE TEN, MINORS

No. 7425DC446

(Filed 17 July 1974)

1. Infants § 9— child in custody of department of social services — standing of former foster parent to bring custody action

Where minor children had been placed in the custody of the county department of social services after the district court determined they were neglected, the mother executed a consent for them to be adopted, and the father's parental rights were terminated pursuant to G.S. 7A-288, a foster parent with whom the children were temporarily placed had no standing to have the court determine the custody of the children, temporary or permanent, after the department removed the children from the foster parent's home to another facility.

2. Parent and Child § 1; Rules of Civil Procedure § 60— termination of parental rights — motion in cause by person not a party

A person who was not a party to a proceeding to terminate parental rights under G.S. 7A-288 has no right to seek review of the case by a motion in the cause. G.S. 1A-1, Rule 60.

Browne v. Dept. of Social Services

APPEAL by respondents from *Duncan, Judge*, 26 November 1973 Session of District Court held in CATAWBA County.

On 25 September 1973, petitioner Mary Elizabeth Browne applied for writ of habeas corpus requesting the court to determine the proper custody of the minor children Angela Ruth Church and Earl Clifford Chuch. Judge Duncan, by order of 25 September 1973, granted the writ, made returnable by respondents on 18 October 1973. On 16 October 1973, respondents moved for a court reporter and that they be excused from having the children present at the hearing, and filed answer. Upon motion of petitioner the proceeding was also treated as "a motion for review in juvenile case 71 J 123." Hearing was held on 29 and 30 November and 5 December 1973. On 18 December 1973, the court entered an order making findings of fact and conclusions of law, and providing that petitioner have custody of the children pending their permanent adoptive placement, and that respondent Department of Social Services pay petitioner \$200 per month for the care and maintenance of the children and pay medical bills. Respondents appealed.

Forrest A. Ferrell and Jeffrey T. Mackie for petitioner appellee.

Corne, Warlick & Pitts, by Thomas W. Warlick, for respondent appellants.

BRITT, Judge.

[1] While respondents assign numerous errors, we find it necessary only to consider respondents' third assignment for the determination of this appeal. The third assignment is to the failure of the court to direct a verdict in respondents' favor. Since the case was tried without a jury, with the court the finder of the facts, a motion for directed verdict was improper; nevertheless, we shall treat respondents' motion as a motion for an involuntary dismissal under G.S. 1A-1, Rule 41(b) in order to pass on the merits of the questions sought to be raised. *Neff v. Coach Co.*, 16 N.C. App. 466, 192 S.E. 2d 587 (1972).

A motion under Rule 41(b) raises the question of whether any findings of fact could be made from the evidence which would support a recovery. *Pegram-West, Inc. v. Homes, Inc.*, 12 N.C. App. 519, 184 S.E. 2d 65 (1971). A review of the evidence reveals no facts under which petitioner would be entitled to an award of custody or other relief.

Browne v. Dept. of Social Services

The evidence tended to show: On 19 November 1971, after an adjudication by the district court that the children were neglected, they were placed in the custody of respondent Department of Social Services. On that date, a representative of the department placed the children with petitioner under the Foster Home Program until procedures could be worked out to qualify the children for adoption. On 10 October 1972, the mother of the children executed a consent for them to be adopted. On 29 May 1973, an order, finding willful abandonment by, and terminating the parental rights of the father, was entered. On 28 August 1973, representatives of respondent Department of Social Services removed the children from petitioner's home to another facility.

G.S. 7A-288 provides for the custody of, and the termination of parental rights in, neglected children. The statute contains the following provision: "In such cases, the court shall place the child by written order in the custody of the county department of social services or a licensed child-placing agency, *and such custodian shall have the right to make such placement plans for the child as it finds to be in his best interest.* Such county department of social services or licensed child-placing agency shall further have the authority to consent to the adoption of the child, to its marriage, to its enlistment in the armed forces of the United States, and to surgical and other medical treatment of the child." (Emphasis added.)

We hold that petitioner had no standing to have the court determine the custody, temporary or permanent, of the children in question.

[2] We then come to the consideration of the treatment by the court of the proceeding as a "Motion for review in Juvenile Case 71 J 123." This would seem to say that there was a motion in the cause to review a former case involving the children. We do not know, because the motion does not appear in the record, and the record does not show the disposition in the former case. Assuming this to be a motion in the cause, and that cause to be the action to terminate parental rights under G.S. 7A-288, we find the motion to be improper. Under G.S. 1A-1, Rule 60, a party or his legal representative may seek relief from a final judgment. Petitioner was not a party, and is not the legal representative of a party, in the former cause.

Meads v. Davis

For the reasons stated, the judgment appealed from is
Reversed.

Judges MORRIS and BAILEY concur.

HARVEY EUGENE MEADS, T/A STANDARD TILE COMPANY v.
NAT DAVIS AND WIFE, MARGARET DAVIS

No. 741SC424

(Filed 17 July 1974)

**Uniform Commercial Code § 14— nonconforming delivery — attempted cure
by seller — instructions**

A seller may at any time before the expiration of the time for performance make a conforming delivery regardless of a prior nonconforming delivery, even if there was a prior delivery which the seller could not reasonably believe would be accepted; therefore, in an action to collect for materials furnished and services rendered by plaintiff in making improvements to defendants' property, it was not error for the trial court to fail to instruct the jury that, "If the plaintiff did not have a reasonable belief that the goods would be accepted, he does not have the right to cure his defect." G.S. 25-2-508.

APPEAL by defendants from *Cohoon, Judge*, 22 October 1973
Session of Superior Court held in PASQUOTANK County.

Plaintiff instituted this action to collect for certain materials furnished, and services rendered, in making improvements to defendants' property. In his complaint, plaintiff alleged that he had entered into a contract with defendants for the furnishing of materials "in connection with the construction of a dwelling house and other improvements situated on land in Salem Township, Pasquotank County, North Carolina, owned by the defendant (sic)" for which defendants agreed to pay \$5,997. Plaintiff also alleged the filing of a lien against the property (described more fully in the complaint) in conformity with the provisions of G.S. 44A-7, et seq., and prayed that the lien be perfected and satisfied. Defendants answered and counterclaimed for damages for breach of the contract, alleging a failure of consideration in that the materials were of inferior quality, and breach of warranty. Plaintiff replied, denying the allegations of defendants and requesting jury trial.

Meads v. Davis

As a result of a pretrial conference the parties agreed:

"In addition to the facts not in genuine dispute, the contentions of the parties are as follows: Defendants contend that there are numerous defects in the materials and workmanship which went into the installation of the carpet and tile. Plaintiff acknowledged the existence of a small factory defect in a portion of the carpet. Plaintiff contends that he has offered to replace the carpet in which there is a small factory defect at no cost to the Defendant and alleges that Defendant has refused to permit him to do so. Defendants contend that the alleged defects in material and workmanship constitute a breach of warranty that the carpet and padding be of 'first quality' and that 'said carpet and tile be installed in a good and workmanlike manner, within a reasonable time.' Plaintiff denies that any express warranties were made by him and contends that Defendants' failure to permit him to cure the existing defect bars the Defendants' claim for breach of warranty."

Issues as to the amount of damages each party should recover were submitted to the jury, who returned a verdict finding that plaintiff is entitled to \$5,997. Judgment was entered in accordance with the verdict and defendants excepted, giving notice of appeal to this court.

Leroy, Shaw, Hornthal & Riley, by Norman W. Shearin, Jr., and Charles C. Shaw, Jr., for plaintiff appellee.

Twiford, Abbott & Seawell, by C. Everett Thompson, for defendant appellants.

BRITT, Judge.

Defendants assign as error the failure of the trial court to instruct the jury: "If the plaintiff did not have a reasonable belief that the goods would be accepted, he does not have the right to cure his defect." Defendants cite G.S. 25-2-508, Official Comment No. 2. We believe that defendants' contention as to the law is wrong and that they have misconstrued the comment.

G.S. 25-2-508 (1) provides: "Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery." It is clear from

Meads v. Davis

this section that the seller may at anytime before the expiration of the time for performance make a conforming delivery regardless of a prior nonconforming delivery. Defendants argue that the right would not exist if there was a prior delivery which the seller could not reasonably believe would be accepted. We reject this argument.

The comment, by its introduction, refers to G.S. 25-2-508 (2), which provides: "Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender." Obviously this section deals with the situation in which the seller knows *prior* to delivery that the goods are not in conformity, but has reason to believe that the buyer will accept. An example of such a situation might be where the buyer orders goods no longer carried by the seller, but the seller has goods which will perform the same function. The section does not apply to the facts shown in the present case.

For the failure of the court to give a requested instruction to be error, the instruction first must be correct. *Bass v. Hocutt*, 221 N.C. 218, 19 S.E. 2d 871 (1942). In this case, the instruction prayed for was not correct, therefore, the assignment is overruled.

The other assignments of error brought forward and argued in defendants' brief relate to the trial court's rulings on the admission and exclusion of certain evidence. Suffice it to say, we have carefully considered the assignments but finding them lacking in merit, they are overruled.

No error.

Chief Judge BROCK and Judge BAILEY concur.

Gibbs v. Heavlin

ROBERT H. GIBBS AND WIFE ELSIE C. GIBBS v. KENNETH C.
HEAVLIN AND WIFE HELEN L. HEAVLIN

No. 7425DC526

(Filed 17 July 1974)

1. Courts § 2— jurisdiction — actions on contracts made in foreign state —
realty in this State and in other State

The court had jurisdiction of the subject matter of claims for breach of contracts made in Florida for the improvement of a house located in this State and for construction of a house in Florida since the claims are transitory and not local.

2. Pleadings § 4; Rules of Civil Procedure § 18— joinder of contract claims

Plaintiff properly joined claims against defendant for breach of a contract to make improvements to a house located in this State and breach of a contract for construction of a house in Florida. G.S. 1A-1, Rule 18.

3. Contracts § 27— breach of contracts — sufficiency of evidence

There was sufficient evidence to support the court's determination that plaintiffs were entitled to recover on their claims for breach of contract for improvement of a house located in this State and for breach of contract to construct a house in Florida.

APPEAL by defendant Kenneth C. Heavlin from *Duncan, Judge*, 12 February 1974 Session of District Court held in CALDWELL County.

This is a civil action in which plaintiffs allege two claims for breach of contract. In the first claim, they allege that they purchased from defendants a house and lot located at Blowing Rock, N. C.; that defendants failed to complete the work on the premises as agreed; and that plaintiffs are entitled to recover \$1,000 because of said breach.

In their second claim, they allege that defendants agreed to build a house on a lot belonging to plaintiffs for a cost of \$48,000; that they advanced defendants \$25,000; that defendants abandoned the project and are indebted to plaintiffs in the sum of \$13,000.

The cause was heard without a jury. During the trial, plaintiffs submitted to a voluntary dismissal as to the feme defendant. Following the trial, the court made findings of fact and conclusions of law and adjudged that plaintiffs recover of the male defendant \$500 on their first claim and \$7,500 on their second claim. The male defendant appealed.

Gibbs v. Heavlin

Finger & Greene, by C. Banks Finger, for plaintiffs appellees.

Louis H. Smith for defendant appellant.

BRITT, Judge.

[1] Defendant's first contention is that the court erred in not granting his motion to dismiss the claims "for lack of jurisdiction of subject matter and misjoinder of causes of action under Rules 16 and 12 and on basis of NCGS 1-75.3 and 1-75.5." He argues that any agreement regarding the house and lot in Blowing Rock was made in Florida; that the house referred to in the second claim alleged was located in Florida; therefore, the North Carolina courts have no jurisdiction.

Plaintiffs' claims are based on alleged contracts and seek the recovery of monetary judgments, therefore, they are transitory and not local. In *Brady v. Brady*, 161 N.C. 324, 326, 77 S.E. 235, 236 (1913), we find: "Actions are transitory when the transactions on which they are based might take place anywhere, and are local when they could not occur except in some particular place. The distinction exists in the nature of the subject of the injury, and not in the means used or the place at which the cause of action arises. *Mason v. Warner*, 31 Mo., 510; *McLeod v. R. R.*, 58 Vt., 732; *Perry v. R. R.*, 153 N.C. 118." See also, *Howle v. Express, Inc.*, 237 N.C. 667, 75 S.E. 2d 732 (1953) and *Bunting v. Henderson*, 220 N.C. 194, 16 S.E. 2d 836 (1941). Defendants were personally served with process in this State. We hold that the trial court had jurisdiction.

[2] With respect to the joinder of claims, G.S. 1A-1, Rule 18, clearly provides that a party asserting a claim for relief may join as many claims, legal or equitable, as he has against an opposing party. We hold that there was no improper joinder of claims in the case at bar.

[3] Defendant's other contention is that the court erred in denying his motions to dismiss pursuant to G.S. 1A-1, Rule 41, for that the plaintiffs showed no right to relief. We reject this contention.

A motion to dismiss under G.S. 1A-1, Rule 41(b), does not raise the question of whether the particular findings made by the court are supported by the evidence, but only the question of whether any findings could be made from the evidence which

State v. Teat

would support a recovery. *Pegram-West, Inc. v. Homes, Inc.*, 12 N.C. App. 519, 184 S.E. 2d 65 (1971). While the evidence presented in the instant case was quite conflicting, we hold that there was evidence upon which the court could make findings supporting a recovery on each of plaintiffs' claims.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN R. TEAT

No. 7427SC480

(Filed 17 July 1974)

1. Criminal Law § 144— setting aside verdict by trial court

After the expiration of the session at which a criminal case is tried, the court does not have the power to vacate the judgment, set aside the verdict and order a new trial; however, there are two exceptions: (1) where the case is kept alive by appeal, a motion for a new trial for newly discovered evidence may be made at the next succeeding session after certification of the opinion of a court of the appellate division, and (2) matters cognizable in a post-conviction hearing.

2. Criminal Law § 144— setting aside verdict by trial court — error

Where defendant was convicted at the 25 September 1972 session of superior court and gave notice of appeal, the superior court did not have authority to entertain defendant's motion made on 2 April 1973 for a new trial grounded upon the inability of the reporter to prepare a transcript.

3. Criminal Law § 154— unavailability of trial transcript— no right to new trial

Where defendant could not obtain a transcript of his trial due to the death of the court reporter before she transcribed her notes, he should have compiled his record on appeal to the extent possible and docketed it in the Court of Appeals rather than filing a motion in superior court for a new trial.

ON *certiorari* to review an order entered by *McLean, Judge*, on 30 April 1973 in the Superior Court in GASTON County. Heard in the Court of Appeals 20 June 1974.

State v. Teat

Defendant was tried before McLean, Judge, at the 25 September 1972 Session of Superior Court held in Gaston County (1) upon a bill of indictment charging him with murder (Gaston County File No. 72CR16376), and (2) upon a bill of indictment charging him with robbery with a firearm (Gaston County File No. 72CR16377). The jury acquitted defendant on the murder charge, but found him guilty of robbery with a firearm. Judgment was entered upon the guilty verdict, and defendant gave notice of appeal.

Because of the inability of the court reporter to prepare a transcript of the trial proceedings within the time originally allowed, Judge McLean extended the time for docketing the record on appeal to the approximate limit under Rule 5 of the Rules of Practice in the Court of Appeals. Shortly after Judge McLean extended time for docketing the record on appeal, the court reporter, Mrs. Roberta R. Wilkie, became ill and was hospitalized. She remained in the hospital until her death on 16 January 1973. Efforts by others to transcribe Mrs. Wilkie's records were unavailing. Because of the reporter's inability to prepare a transcript of the trial proceedings, defendant did not perfect his appeal.

On 2 April 1973, defendant filed in the Superior Court in Gaston County a motion for a new trial grounded upon the inability of the reporter to prepare a transcript. Judge McLean found the facts to be substantially as alleged by defendant, and entered an order on 30 April 1973, which purported to set aside the verdict, judgment and commitment entered in the case of robbery with a firearm (Gaston County File No. 72CR16377) and purported to direct a new trial in that case.

Upon petition by the State, this Court, on 18 March 1974, issued the writ of certiorari to review Judge McLean's order of 30 April 1973.

Attorney General Morgan, by Assistant Attorney General Chalmers, for the State.

Frank Patton Cooke, for the defendant.

BROCK, Chief Judge.

It is clear that Judge McLean undertook to vacate a judgment and set aside a verdict rendered during a session of court which had long since expired.

State v. Teat

[1, 2] All matters pending before the court are *in fieri* during the session. During the session at which a criminal case is tried, the court has power to vacate the judgment, set aside the verdict and order a new trial. With two exceptions, after the expiration of the session at which the case is tried, such power does not exist in criminal cases. The two exceptions are: where the case is kept alive by appeal, a motion for a new trial for newly discovered evidence may be made at the next succeeding session after certification of the opinion of a court of the appellate division, 3 Strong, N. C. Index 2d, Criminal Law, § 131, p. 53; and matters cognizable in a post-conviction hearing. G.S., Chap. 15, Art. 22. See, *State v. Cagle*, 241 N.C. 134, 84 S.E. 2d 649; *State v. McLamb*, 208 N.C. 378, 180 S.E. 586; 3 Strong, N. C. Index 2d, Criminal Law, § 144, p. 85. The authority for action in civil cases, after expiration of the session, is set forth in the Rules of Civil Procedure, G.S., Chap. 1A.

Judge McLean did not have the authority to entertain defendant's motion for a new trial, and the order of 30 April 1973 will be vacated.

[3] As this Court stated in *State v. Neely*, 21 N.C. App. 439, 204 S.E. 2d 531:

"Defendant should have proceeded to compile his record on appeal to the extent possible. If the Reporter is unable to furnish a transcript, a statement of that fact, agreed to by the Solicitor or settled by the judge, should be included in the record on appeal. In lieu of the usual narrative statement of evidence, defendant should set out the facts upon which his appeal is based, any defects appearing on the face of the record, and the errors he contends were committed at the trial. If the circumstances so justify, defendant might also assert as an assignment of error that he is unable to obtain an effective appellate review of errors committed during the trial proceeding because of the inability of the Reporter to prepare a transcript. As agreed upon by counsel, or as settled by the trial judge, the record on appeal as above compiled should be docketed in this Court.

"If defendant had proceeded as outlined above, this Court would be in a position to determine whether fair and proper administration of justice required a new trial.

"It is possible, if he feels so advised, for defendant now to prepare such a record on appeal and present it to this

Furr v. Furr

Court with a proper petition for writ of certiorari seeking a review."

The order of 30 April 1973 is

Vacated.

Judges CAMPBELL and HEDRICK concur.

FRANCES EARLENE H. FURR v. HAROLD G. FURR

No. 7420DC356

(Filed 17 July 1974)

1. Divorce and Alimony § 24— child visitation privileges — lack of specificity

Order giving defendant child visitation rights is not invalid by reason of its failure to define the specific day and hour they are to be exercised or to define the mode of transfer of temporary custody to defendant.

2. Divorce and Alimony § 18— permitting wife to use acreage surrounding residence

Order permitting plaintiff to use the entire 66% acres surrounding the residence pending trial of the action was not improper where there was no evidence that the land was usable for any purpose other than the residence.

3. Divorce and Alimony § 18— amount of counsel fees

Court's findings of fact concerning the services rendered by plaintiff wife's counsel support the amount awarded by the court as counsel fees *pendente lite*.

4. Divorce and Alimony § 18— amount of alimony *pendente lite*

Court's findings of fact as to plaintiff's needs, defendant's needs and defendant's ability to pay support the amount awarded by the court as alimony *pendente lite*.

APPEAL by defendant from Webb, District Judge, heard by consent of the parties at the 25 October 1973 Session of District Court held in ANSON County. Heard in the Court of Appeals 15 May 1974.

This is an action for alimony without divorce, support and custody of two minor children, and counsel fees. The order appealed from awards alimony, support and custody, and counsel fees *pendente lite*.

Furr v. Furr

Brown, Brown & Brown, by Charles A. Brown, for the plaintiff.

Gerald R. Chandler, for the defendant.

BROCK, Chief Judge.

For purposes of this appeal, defendant does not contest the right of plaintiff to have an award of alimony, to have an award for the support of two minor children, to have primary custody of two minor children, or to have an award of counsel fees. The assignments of error brought forward and argued by defendant may be fairly summarized as follows: (1) He objects to the lack of specificity of his rights of visitation with the two children; (2) he objects to the award for plaintiff's use of the property surrounding the residence property; (3) he objects to the amount awarded as counsel fees; and (4) he objects to the amount awarded as alimony *pendente lite*.

[1] The order for visitation rights by defendant does not define the specific day and hour that it is to be exercised, nor does it define the mode of transfer of temporary custody to defendant. It appears that the trial judge deliberately left the terms flexible to better accommodate the schedules of all persons involved. It is reasonable to assume that two intelligent, adult persons can abide by the order as written. If defendant encounters unreasonable difficulty in exercising his visitation rights, he may apply to the trial judge, who can compel compliance with the order by making it more specific. The flexibility of the order as it now stands can accommodate defendant's schedule better than a more rigid order.

[2] The use of the residence of the parties which was awarded to plaintiff is located upon a tract of land containing approximately $66\frac{2}{3}$ acres, which the parties own as tenants by the entirety. Although this is a rather large residence acreage, there is absolutely no evidence that it is usable for any other purpose. If circumstances develop to show a different need for a part of the tract of land, the trial judge, upon proper application, can make such adjustments as appear appropriate.

[3] Defendant does not except to the findings of fact by the trial judge concerning extensive service by counsel for plaintiff. The judge's findings of fact on this subject take into consideration the types of services rendered and the total hours

State v. Greenlee

involved. Defendant's exception to the amount of counsel fees awarded raises only the question of whether the findings of fact support the order. *Newbern v. Barnes*, 3 N. C. App. 521, 165 S.E. 2d 526. It does not present for review whether the findings of fact are supported by the evidence. In our opinion, the findings of fact concerning the services rendered by plaintiff's counsel support the order for the payment of the amount specified.

[4] Defendant does not except to the findings of fact relative to plaintiff's needs, defendant's needs, and defendant's ability to pay. There was extensive evidence of plaintiff's needs, defendant's needs, and defendant's estate and earnings. Defendant's exception to the amount awarded as alimony *pendente lite* raises only the question of whether the findings of fact support the order. *Newbern v. Barnes*, *supra*. It does not present for review whether the findings of fact are supported by the evidence. In our opinion, the findings of fact concerning plaintiff's needs, defendant's needs, and defendant's ability to pay support the order for the amount specified.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. ELBERT GREENLEE

No. 7429SC522

(Filed 17 July 1974)

1. Criminal Law § 76— findings as to voluntariness of confession — appellate review

Where the trial court's findings that defendant's in-custody statements were freely, voluntarily and understandingly made are supported by competent evidence, they will not be disturbed on appeal.

2. Criminal Law § 75— in-custody statements — witness's reference to memorandum — refreshing recollection

It was permissible for a law officer to refer to a memorandum for the purpose of refreshing his recollection as to in-custody statements made by defendant.

APPEAL by defendant from *Exum, Judge*, 7 January 1974 Session of Superior Court held in McDOWELL County. Heard in the Court of Appeals 13 June 1974.

State v. Greenlee

Defendant was charged in a bill of indictment with the murder of James Robert Wilkerson. Upon call of the case for trial, the solicitor announced that the State would seek a conviction of second degree murder or manslaughter, as the evidence might determine.

The State's evidence tends to show the following: Defendant was trying to collect \$2.00 which the victim owed him. They got into an argument and a scuffle in the residence of the victim's relative. They were made to leave the residence. Defendant and the victim engaged in a fist fight outside the residence. As the victim undertook to run from defendant, defendant picked up a wooden board and struck the victim on the right side of the head. The victim died as a result of a fractured skull.

The jury found defendant guilty of second degree murder and judgment of imprisonment for a term of not less than twelve nor more than fifteen years.

Attorney General Morgan, by Assistant Attorney General Davis, for the State.

Everette C. Carnes, for the defendant.

BROCK, Chief Judge.

[1] Defendant assigns as error that the trial court found that "defendant had knowingly and understandingly waived his constitutional rights before an 'in custody' interrogation." The substance of defendant's argument is that defendant's confession to the investigating officers was not free and voluntary.

Upon defendant's objection to testimony concerning statements made by him, the trial court conducted an extensive *voir dire*. The trial court found, from competent evidence, that defendant's statements were freely, voluntarily and understandingly made. Where such findings are supported by competent evidence, they will not be disturbed on appeal.

[2] Defendant assigns as error that the trial court permitted the officers to testify as to what defendant told them. It seems that the thrust of defendant's argument is that the officers should not be permitted to use a memorandum which merely summarized the interrogation. He seems to argue that the record must be a verbatim transcript of the interrogation, or, if a summary is to be used, the defendant must have approved the

Tolbert v. Tea Co.

accuracy of the summary. Defendant cites *State v. Walker*, 269 N.C. 135, 152 S.E. 2d 133, in support of his argument. We think the cited case does not aid his argument.

Defendant seems to contend that the investigating officers were permitted to read to the jury their memoranda of the interrogation. Clearly, this would be improper if defendant had not signified his approval of their content. *State v. Walker, supra*. However, the officers merely used the memoranda to refresh their recollection. Later, while under cross-examination by defense counsel, and at the request of the cross-examiner, Deputy Nix read a portion of his notes to the jury. Defendant may not now complain of the officer doing what he asked him to do. During the *voir dire*, parts of the memoranda were read, but this could not prejudice the jury against defendant. The State did not offer the memoranda or their content in evidence. The State offered testimony of the witnesses, who related what defendant told them as they recalled it. It was permissible for each officer to refer to a memorandum prepared by him for the purpose of refreshing his recollection as to statements made by defendant. *State v. Walker, supra*.

We have reviewed defendant's assignments of error to the trial court's instructions to the jury. We find no prejudicial error. In our view, defendant received a fair trial.

No error.

Judges CAMPBELL and HEDRICK concur.

HAROLD TOLBERT v. THE GREAT ATLANTIC AND PACIFIC TEA
COMPANY, INC.

No. 7427SC354

(Filed 17 July 1974)

Negligence § 5.1— fall by store customer — error in summary judgment
for defendant

In an action to recover for injuries sustained when plaintiff fell while shopping in defendant's grocery store, the trial court erred in granting defendant's motion for summary judgment where the deposition filed by defendant tended to show that plaintiff was injured by reason of an unsafe condition caused by strawberries on the floor of the store and defendant failed to produce evidence that the unsafe condition was not caused by its negligence.

Tolbert v. Tea Co.

APPEAL by plaintiff from *Snepp, Judge*, 18 February 1974 Session of Superior Court held in GASTON County.

Plaintiff brought this action to recover damages for personal injuries allegedly sustained when he fell while shopping in one of defendant's stores. Plaintiff alleged, in part, as follows:

"On said occasion the defendant, its agents and servants, negligently and carelessly, and without due regard for the safety of patrons of defendant and the public, permitted a slippery and foreign substance to be present on the floor of said store premises, so that when plaintiff entered upon the premises without notice of said substance, he slipped and fell, injuring his head, shoulders, cervical spine, and other parts of his body. That defendant, its agents and employees, knew or should have known of the presence of said slippery and foreign substance on the floor of defendant's premises and negligently failed to remove the same prior to the time of injury of plaintiff."

Defendant moved for summary judgment and filed a deposition it had taken from plaintiff in support of the motion. Plaintiff did not file affidavits or other evidence in response to defendant's motion.

In summary, plaintiff's deposition discloses the following. On 28 July 1972, plaintiff had collected a full basket of groceries while shopping at an A & P supermarket in Gastonia, North Carolina. While rounding an aisle corner, plaintiff slipped and fell. Plaintiff described the accident as follows:

"[M]y foot slipped on the stuff that was on the floor. My feet flew out from under me and my head hit the floor and I felt very severe pain in my neck and shoulder area."

Although plaintiff did not notice any foreign matter on the floor prior to falling, immediately thereafter he observed some matter which "... just looked like red—looked like strawberries, looked like an old crushed tomato or something or other. . . [J]ust little pieces of red stuff, the strawberries, and they were mashed up on the floor. . . ." Plaintiff estimated that there were at least three "pretty-good-sized" or "large" strawberries on the floor but could not say whether they had crowns. Plaintiff explained that although he did not touch the strawberries with his fingers, he did scrape them with his foot and they were "partially moist and partially dry." On the day he

Tolbert v. Tea Co.

fell, strawberries were being sold in the store's produce department. The berries were packaged in little boxes which were displayed on the main produce counter that extended the length of the aisle and on a table situated in front of that counter half-way down the aisle. Plaintiff did not know whether the boxes were covered with any sort of wrapping. The strawberries were displayed at least 25-30 feet from where plaintiff slipped.

At the time of the accident the store was very crowded, and there were several shoppers in the vicinity where plaintiff fell. Two women and the produce manager saw the accident. Right after plaintiff fell, the produce manager came over. He inspected the foreign matter in the aisle "and tried to get it off the floor [with his foot] because he wasn't sure how long it had been there."

Plaintiff received extended medical treatment for injuries suffered in the fall.

No other affidavits were filed by defendant in support of his motion. Defendant's motion for summary judgment was granted, and plaintiff appealed.

Basil L. Whitener and Anne M. Lamm for plaintiff appellant.

Hollowell, Stott & Hollowell by L. B. Hollowell, Jr., for defendant appellee.

VAUGHN, Judge.

The deposition filed by defendant tends to show that plaintiff was injured by reason of an unsafe condition existing on the floor of an aisle in defendant's store. Defendant does not contend that contributory negligence, as a matter of law, has been shown.

The thrust of defendant's argument in support of the trial court's action is that there is no evidence to show how the strawberries got on the floor or whether the unsafe condition had been allowed to exist for such time that defendant by the exercise of reasonable care should have known of its existence.

Assuming, without deciding, that defendant's impression of the testimony it elicited from plaintiff when the deposition was taken is correct, the argument is irrelevant to the question presented for decision on this appeal.

Mason v. Mason

Defendant, moving for summary judgment, assumes the burden of producing evidence, of the necessary certitude, which negatives plaintiff's claim.

Plaintiff, opposing defendant's motion for summary judgment, does not have the burden of coming forward with the evidence until defendant, as movant, has produced his evidentiary material tending to show that he is entitled to judgment as a matter of law.

It was defendant's duty to produce evidence that the unsafe condition was not caused by its failure to exercise reasonable care. It was defendant who left the record silent, if it is, concerning its exercise of reasonable care to prevent or to discover and remove the peril to plaintiff and others invited to shop on its premises.

Where, as here, the movant for summary judgment does not offer evidence to establish the absence of a genuine issue as to any material fact, summary judgment should be denied even though no opposing evidence is presented.

It was error to allow defendant's motion for summary judgment.

Reversed.

Judges PARKER and HEDRICK concur.

BEN C. MASON v. GRACE T. MASON

No. 7411DC475

(Filed 17 July 1974)

Judgments § 25; Rules of Civil Procedure § 60— setting aside absolute divorce — mistake, surprise, excusable neglect— insufficiency of evidence and findings

Order setting aside a judgment of absolute divorce on grounds of "mistake, surprise or excusable neglect" must be set aside since (1) such order is not supported by the court's findings that an action for alimony without divorce by defendant was pending when the divorce action was instituted, that defendant employed an attorney to contest the divorce but he failed to file answer, that the divorce was granted at a criminal session when defendant had no notice of the trial, and that defendant had a meritorious defense of abandonment, and (2)

Mason v. Mason

there is no evidence in the record to support the court's findings. G.S. 1A-1, Rule 60(b) (1).

APPEAL by plaintiff from *Godwin, Judge*, 4 February 1974 Session of District Court held in LEE County. Heard in the Court of Appeals 30 May 1974.

Plaintiff, Ben C. Mason, instituted this action on 21 November 1973 by filing a complaint seeking an absolute divorce from the defendant, Grace T. Mason. The defendant filed no responsive pleadings and on 8 January 1974, plaintiff was granted a judgment of absolute divorce.

On 4 February 1974, defendant's counsel notified plaintiff that he would move on 7 February 1974 to set aside the judgment of absolute divorce on the grounds that this judgment was entered through mistake, inadvertence, or excusable neglect. On 7 February 1974, the motion came on for hearing before Judge Godwin, but no evidence was offered in support of the motion. After oral argument of counsel, Judge Godwin announced that he was setting aside the judgment "upon the record". The order setting aside the judgment contains, among other things, the following findings and conclusions:

"[T]hat at the time of the institution of this suit there was then pending in the District Court of Lee County an action for alimony without divorce, child custody, and alimony pendente lite, wherein the defendant herein is plaintiff and the plaintiff herein is defendant, in which action it is alleged that the plaintiff herein had unlawfully abandoned the defendant here;

[T]hat the defendant herein intended in good faith to contest the plaintiff's right to absolute divorce, and that she employed counsel for said purpose, and that an answer was prepared during the month of November, 1973, but that through mistake, inadvertence, or excusable neglect said answer was not filed;

[T]hat on January 8, 1974, at a criminal session of the District Court of Lee County the plaintiff was granted an absolute divorce from the defendant, but that said action was not calendared and that neither the defendant nor her counsel had prior notice of said trial;

[T]hat the defendant has a meritorious defense to the plaintiff's action, to wit, the plaintiff's unlawful abandonment and non-support of the defendant;"

Mason v. Mason

Plaintiff excepted to the material findings and conclusions of the court and appealed.

Wilson, Bowen & Lytch by Wiley F. Bowen for plaintiff appellant.

No counsel contra.

HEDRICK, Judge.

G.S. 1A-1, Rule 60(b) (1) of the Rules of Civil Procedure provides that a party may be relieved from a final judgment on the following grounds: "Mistake, inadvertence, surprise, or excusable neglect." Determination of whether excusable neglect, inadvertence, or surprise has been shown is a question of law, not a question of fact, *Equipment, Inc. v. Lipscomb*, 15 N.C. App. 120, 189 S.E. 2d 498 (1972); and the conclusion reached is final "unless, exception is made that there was no evidence to support the findings of fact or that there was a failure to find sufficient material facts [to support the conclusion]." *Ellison v. White*, 3 N. C. App. 235, 164 S.E. 2d 511 (1968), cert. denied 275 N.C. 137 (1969).

Plaintiff contends that the order setting aside the judgment was improperly granted because (1) the trial court failed to find sufficient facts to support its conclusion that the defendant was entitled to relief from the judgment of absolute divorce because of mistake, inadvertence or excusable neglect, and (2) the record is devoid of any evidence which would support such findings.

While the trial court did make certain findings, we are of the opinion that the findings made are not sufficient to support an order setting aside a final judgment on the grounds of "mistake, inadvertence or excusable neglect". Moreover, there is a complete absence from this record of any evidence to support the findings of fact made by the trial judge. Indeed, the trial judge made it clear that he was making his findings and conclusions from the record and that he was not going to hear any evidence. The order setting aside the final judgment clearly reflects that the trial judge considered matters which are not included in the record on appeal.

For the reasons stated, the order appealed from is vacated and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

Morgan, Atty. General v. Power Co.

Vacated and remanded.

Judges MORRIS and BAILEY concur.

ROBERT MORGAN, ATTORNEY GENERAL v. DUKE POWER COMPANY
AND STATE OF NORTH CAROLINA, EX REL. UTILITIES COM-
MISSION

No. 7410UC414

(Filed 17 July 1974)

Utilities Commission § 9— coal cost adjustment — interim order — prema-
ture appeal

Appeal from an interim order of the Utilities Commission permit-
ting an electric power company to add a coal cost adjustment charge to
its rates is dismissed as premature. G.S. 7A-29.

APPEAL by plaintiff from an order of the North Carolina
Utilities Commission in Docket No. E-7, Sub 159, and Docket
No. E-7, Sub 161, entered on 31 January 1974. Heard in the
Court of Appeals on 30 May 1974.

On 30 November 1973, Duke Power Company (Duke) filed
with the North Carolina Utilities Commission (Commission) a
proposed change in its rates and charges. This charge was to
take the form of a coal cost adjustment clause (coal clause),
which was to be added to each of Duke's retail electric schedules
in North Carolina. An affidavit of Mr. B. B. Parker, Duke's
Executive Vice-President, was filed along with this application.

On 19 December 1973, the Commission issued an order in
Docket E-7, Sub 161, allowing the coal clause to go into effect
on bills rendered on and after 19 January 1974. This order con-
solidated Docket E-7, Sub 161, with Duke's pending general
rate increase (Docket E-7, Sub 159) and in so doing stated: "All
evidence heretofore presented in this matter is subject to cross-
examination and further review before final disposition as a
part of Docket E-7, Sub 159."

On 18 January 1974, the Attorney General, an intervenor in
Docket E-7, Sub 159, filed notice of appeal and exceptions and
a motion to postpone the order of 19 December 1973, pending
judicial review, or in the alternative to rescind said order or to
modify said order to provide for a refund with interest under

Morgan, Atty. General v. Power Co.

bond. This motion was denied by the Commission on 31 January 1974, and the Attorney General appealed to this Court therefrom.

Attorney General Robert Morgan by Assistant Attorney General I. Beverly Lake, Jr., and Associate Attorney Jerry J. Rutledge for plaintiff appellant.

William H. Grigg, Steve C. Griffith, Jr., Clarence W. Walker and John M. Murchinson, Jr., for defendant appellee Duke Power Company.

Commission Attorney Edward B. Hipp and Associate Commission Attorney John R. Molm for defendant appellee North Carolina Utilities Commission.

HEDRICK, Judge.

Motions to dismiss the Attorney General's appeal as being interlocutory in nature were filed in this Court by both Duke Power Company and the North Carolina Utilities Commission. Furthermore, in the Commission's motion to dismiss it is noted that by order dated 16 April 1974, the Commission reconsidered the application filed by Duke and modified its order of 19 December 1973 to provide "that the coal cost and adjustment clause granted Duke should be subject to refund with interest and undertaking for refund pending final determination and order in Docket No. E-7, Sub 161."

The right of appeal from any final order or decision of the North Carolina Utilities Commission is expressly granted by G.S. 7A-29. Thus, the only question for our determination is whether the order appealed from in the instant case is a final order. A careful examination of the language contained within the order entered on 19 December 1973, manifests the fact that this order is interim in nature and not intended to be a final disposition of this matter. The interlocutory character of this order is exemplified by the following statement appearing in the conclusion of the Commission:

"However, recognizing the fact that there has been no hearing and no opportunity for complaints, testimony or cross-examination, the Commission deems it appropriate to consolidate this Docket (E-7, Sub 161) with the pending rate increase Docket (E-7, Sub 159) to afford opportunity for further review and final disposition of a fuel cost clause

State v. Reavis

as a part of the consideration of all rates of Duke." (Emphasis added.)

Similar language appearing at the end of the order reinforces our determination that this is not a final order as required by G.S. 7A-29. Therefore, the appeal is

Dismissed.

Judges MORRIS and BAILEY concur.

STATE OF NORTH CAROLINA v. RICKY DALE REAVIS

No. 7425SC445

(Filed 17 July 1974)

1. Searches and Seizures § 3— sufficiency of affidavit to support search warrant

Affidavit was sufficient to support issuance of a search warrant where it set out the amount of marijuana defendant was expected to have, the time of day when delivery was expected to take place, a description of the car defendant would be driving, the reliability of the confidential informer, and a statement by the affiant that he had secured information from other sources that defendant was engaged in selling drugs.

2. Criminal Law § 169; Searches and Seizures § 3— search warrant and affidavit — admission harmless

Even if the trial court erred in allowing into evidence a search warrant and its accompanying affidavit, evidence of defendant's guilt was overwhelming so that the error was not prejudicial.

APPEAL by defendant from *McConnell*, Judge, 3 December 1973 Session of Superior Court held in CATAWBA County.

Heard in the Court of Appeals 11 June 1974.

On 24 August 1973 Grady W. Conner and Kenneth W. Elliott, two Catawba County law enforcement officers, obtained a search warrant and searched defendant's car. In the trunk of the car they found a brown paper bag containing ten plastic bags of marijuana. The total amount of marijuana in the bags was 323 grams.

Defendant was indicted and tried for possession of marijuana with intent to distribute. At the beginning of the trial,

State v. Reavis

before any evidence was presented, defendant moved to quash the search warrant on the ground that it was issued without probable cause. The court denied his motion, and the bags of marijuana were introduced into evidence at the trial.

The jury found defendant guilty as charged. From the sentence imposed by the court, defendant appeals.

Attorney General Robert Morgan, by Assistant Attorney General William F. Briley, for the State.

W. Gene Sigmon for defendant appellant.

BALEY, Judge.

[1] Defendant contends that there was no probable cause for the issuance of the search warrant and that evidence revealed by the search was inadmissible. This contention cannot be sustained. In order to obtain a search warrant, Officer Conner submitted an affidavit setting forth the facts which established probable cause. In this affidavit he stated that a confidential informer had told him that defendant would deliver marijuana to Steven Wayne Wray on 24 August 1973. The affidavit set out the amount of marijuana that defendant was expected to have; the time of day when the delivery was expected to take place; and a description of the car defendant would be driving. It explained the reasons why the confidential informant was considered reliable. In addition, Officer Conner stated in the affidavit that he had secured information from other sources that defendant was engaged in selling drugs and had checked the accuracy of all his information and found it to be correct as far as he could determine. This affidavit contained sufficient information to justify a finding of probable cause and the issuance of the search warrant. *Draper v. United States*, 358 U.S. 307 (1959); *State v. Ellington*, 284 N.C. 198, 200 S.E. 2d 177; *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755.

Upon cross-examination of Officer Conner, defense counsel asked questions about the contents of the affidavit supporting the search warrant, whereupon the court permitted the witness to read the entire affidavit to the jury. Defense counsel also examined the witness about statements which he had made to the court in a pretrial conference concerning the reputation of defendant for distribution of illicit drugs, and the court then allowed the entire conversation to be admitted into evidence. Both the introduction of the affidavit and the information dis-

State v. Reavis

closed about defendant's prior reputation and charge of a crime for which he was not convicted were precipitated by the inquiries of counsel for the defendant on cross-examination. After it was revealed at the trial that this witness had made a statement to the court in a legitimate pretrial discussion, the court had a clear right to see that the entire conversation was placed on the record so that the full facts would be disclosed and there could be no intimation of any improper conduct.

The court may examine witnesses to clarify their testimony. *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59; *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376, *cert. denied*, 393 U.S. 1087; *State v. Case*, 11 N.C. App. 203, 180 S.E. 2d 460.

A witness who has been impeached by prior inconsistent statements must be allowed to explain them. *State v. Minton*, 234 N.C. 716, 68 S.E. 2d 844; *State v. Pulley*, 63 N.C. 8.

[2] The admission into evidence of the search warrant and accompanying affidavit may be error, *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881, but, under the facts here disclosed, we do not consider it to be prejudicial error. The evidence is uncontradicted that defendant was apprehended in the possession of 323 grams of marijuana. When he opened the trunk of his car at the direction of the officers, he grabbed the paper bag containing the marijuana and started to run with it and then threw the bag a short distance when he was tackled by an officer. Since we find the search of the car and the seizure of the marijuana to be proper, the evidence of defendant's guilt is overwhelming, and the admission of the affidavit and search warrant could not reasonably have produced a different result.

Defendant has been convicted by a jury in a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge BRITT concur.

State v. Williams

STATE OF NORTH CAROLINA v. STEVE W. WILLIAMS

No. 7430SC529

(Filed 17 July 1974)

1. Narcotics § 4— possession of marijuana with intent to distribute— sufficiency of evidence

In a prosecution for possession of marijuana with intent to distribute, evidence was sufficient to be submitted to the jury where it tended to show that 43 grams of marijuana were found in an apartment by a deputy sheriff, defendant was in the apartment when the marijuana was found, and defendant stated that the apartment was his or he was one of the renters.

2. Narcotics § 5— charge of possession with intent to distribute — verdict of guilty of possession for sale

In a prosecution for possession of marijuana with intent to distribute, the trial court did not err in denying defendant's motion to set aside the verdict where defendant was indicted for possession with intent to distribute, the court instructed the jury on the elements of that offense, and the evidence tended to show the commission of that offense, but the jury foreman stated the verdict as "guilty of possession for the purpose of sale."

APPEAL by defendant from *Wood, Judge*, 11 February 1974 Session of Superior Court held in HAYWOOD County.

Heard in the Court of Appeals 12 June 1974.

Defendant was indicted and tried for possession of marijuana with intent to distribute. He was convicted by a jury and received a prison sentence. He appealed to this Court.

Attorney General Robert Morgan, by Associate Attorney W. A. Raney, Jr., for the State.

Edward Thornhill III for defendant appellant.

BALEY, Judge.

[1] Defendant first contends that the court erred in denying his motion for nonsuit. This contention is not well founded, for the evidence is clearly sufficient to support his conviction. Ronald Claude Green, a Haywood County deputy sheriff, testified that he found 43 grams of marijuana in an apartment at the Valley Paradise Motel in Maggie Valley. Green stated that defendant was present in the apartment when the marijuana was found, and when he asked defendant "if it was indeed his

State v. Williams

apartment . . . he said it was his apartment or he was one of the renters of the apartment."

[2] Defendant next asserts that the verdict returned by the jury was improper and should have been set aside. When the jury completed its deliberations and returned to the courtroom in this case, the following proceedings occurred:

"The Jury, following deliberations, returns to open Court and answered to the question: 'Do you find him guilty of possession of marijuana with intent to distribute, guilty of simple possession or not guilty?', as stated by the Assistant Clerk of Superior Court.

"THE FOREMAN: Guilty of possession for the purpose of sale.

"ASSISTANT CLERK: So say you all?

"THE JURY: Yes."

Although the foreman incorrectly used the word "sale" instead of "distribution," it is obvious that the jury intended to find defendant guilty of possession with intent to distribute. Defendant was indicted for possession with intent to distribute, and the court instructed the jury on the elements of this offense. All of the State's evidence tended to show that 43 grams of marijuana were found in defendant's possession at his apartment. Under G.S. 90-95(f) (3), as it provided at the time when this offense was committed, possession of more than five grams of marijuana was presumed to be for the purpose of distribution, and the court so instructed the jury.

"[T]he verdict should be taken in connection with the issue being tried, the evidence, and the charge of the court." *Davis v. State*, 273 N.C. 533, 539, 160 S.E. 2d 697, 702; *accord*, *State v. Smith*, 226 N.C. 738, 40 S.E. 2d 363; *State v. Cody*, 224 N.C. 470, 31 S.E. 2d 445. "A verdict is not bad for informality . . . if it is such that it can be clearly seen what is intended. It is to have a reasonable intendment and is to receive a reasonable construction and must not be voided except from necessity. . . . Although defective in form, if it substantially finds the question in such a way as will enable the court intelligently to pronounce judgment thereon according to the manifest intention of the jury, it is sufficiently certain to be received and recorded." *State v. Perry*, 225 N.C. 174, 176, 33 S.E. 2d 869, 870; *accord*, *State v.*

State v. Butts

McKay, 150 N.C. 813, 63 S.E. 1059; *State v. Whisenant*, 149 N.C. 515, 63 S.E. 91.

In *State v. Ellison*, 230 N.C. 59, 52 S.E. 2d 9, relied upon by defendant, the verdict was set aside because it was ambiguous and could be interpreted as finding the defendant guilty of an act which was not a crime. The verdict in the present case contains no such ambiguity, and the *Ellison* case is therefore distinguishable.

The trial court did not err in denying defendant's motion for nonsuit and his motion to set aside the verdict.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. SUE BUTTS, SIMON COPELAND,
JAMES EDWARD HOLLEY, RICHARD EARL MOORING, AND
PATRICIA ANNETTE RASCOE

No. 741SC296

(Filed 17 July 1974)

Criminal Law § 138— increased punishment upon retrial — necessity for explanation

There is no requirement that the superior court upon imposing a harsher sentence than that of the district court make the reasons appear of record.

APPEAL from *Copeland, Judge*, 24 September 1973 Session of CHOWAN County Superior Court. Heard in the Court of Appeals 17 June 1974.

Defendants were charged in valid warrants with refusing to disperse when commanded to do so by a law enforcement officer, when the officer believed that defendants were engaged in disorderly conduct as defined by G.S. 14-288.4. The defendants pled not guilty at the 7 August 1973 Session of Chowan District Court, and all were convicted and sentenced to 90 days in the county jail, suspended for one year. Defendants appealed to the Superior Court for a trial de novo.

At the 24 September 1974 Session of Superior Court, all cases were consolidated for trial, and all defendants entered

State v. Butts

pleas of not guilty. The jury returned verdicts of guilty as charged as to each defendant. Defendants Copeland, Holley and Mooring were sentenced to three months in the county jail. Defendants Butts and Rascoe were sentenced to six months in the county jail suspended for four years.

From the signing and entry of judgment, all defendants appealed, assigning error to the failure of the trial court to state his reasons for imposing more severe sentences than did the District Court.

Attorney General Morgan, by Deputy Attorney General Vanore, for the State.

Leroy, Shaw, Hornthal and Riley, by Charles C. Shaw, Jr., for defendant appellants.

MORRIS, Judge.

The defendants' only assignment of error is to the court's increasing on trial de novo the sentences imposed by the District Court without making his reasons for so doing a part of the record. Defendants' acknowledge the power of the Superior Court to impose a more severe sentence. *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970). Defendants, however, contend that the increased sentences on trial de novo reveal a vindictiveness on the part of the trial court and a desire to punish defendants for exercising their right to have a jury trial and a trial de novo. This contention is untenable.

In *State v. Stafford*, 274 N.C. 519, 164 S.E. 2d 371 (1968), the Supreme Court held that there is no requirement that the court state its reasons for an increased sentence upon trial de novo.

"Weighing against the hazards which accompany a flat prohibition of increased sentences, the danger that on a second trial the judge will vindictively punish a prisoner for asserting his rights we are of the considered opinion that the likelihood of judicial malfeasance is the lesser danger. We hold, therefore, that unless it affirmatively appears that a second sentence has been increased to penalize a defendant for exercising rights accorded him by the constitution, a statute, or judicial decision, a longer sentence does not impose an unreasonable condition upon the exer-

State v. Butts

cise of those rights nor does it deprive him of due process. The presumption is that the judge has acted with the proper motive and that he has not violated his oath of office. The burden is on the prisoner to overcome that presumption." *Id.*, at 531.

In *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972), the Supreme Court rejected the contention that a greater sentence could not be imposed on trial de novo absent "specified findings". The Court stated that although a greater sentence may be imposed upon trial de novo,

"it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty. The trial de novo represents a completely fresh determination of guilt or innocence." 407 U.S. at 117.

In *Pearce v. North Carolina*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), the Supreme Court held that in order to assure the absence of retaliation by a trial court in resentencing a defendant whose previous conviction had been overturned on appeal, the trial judge must make the reasons for a harsher sentence on retrial affirmatively appear of record. In *Colten v. Kentucky*, *supra*, the Supreme Court held that the possibility of vindictiveness, found to exist in *Pearce* is not inherent in Kentucky's trial de novo system.

"We note first the obvious: that the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly. Nor is the de novo court even asked to find error in another court's work. Rather, the Kentucky court in which Colten had the unrestricted right to have a new trial was merely asked to accord the same trial, under the same rules and procedures, available to defendants whose cases are begun in that court in the first instance." 407 U.S., at 116-117.

The North Carolina trial de novo procedure, like that of Kentucky, is free from the possibility of vindictiveness found by the Supreme Court to exist in *Pearce v. North Carolina*, *supra*. There is no requirement that the Superior Court upon imposing a

Brooks v. Brooks

harsher sentence than that of the District Court make the reasons appear of record.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

ANNIE LEE MEEKS BROOKS v. MARSHALL LEE BROOKS

— AND —

MARSHALL LEE BROOKS v. ANNIE LEE MEEKS BROOKS

No. 7419DC274

(Filed 17 July 1974)

APPEAL by Marshall Lee Brooks from *Walker, District Judge*, 24 September 1973 Session of District Court held in CABBARRUS County. Heard in the Court of Appeals 14 May 1974.

On 3 July 1972, Annie Lee Meeks Brooks instituted an action for alimony without divorce, alleging as grounds for relief that her husband, Marshall Lee Brooks, wilfully abandoned her. While the action for alimony without divorce was pending, on 9 April 1973, Marshall Lee Brooks instituted an action for absolute divorce upon the grounds of one year of separation. The two actions were consolidated for trial. The jury answered issues, including an issue of abandonment, in favor of Annie Lee Meeks Brooks and against Marshall Lee Brooks. Judgment was entered upon the verdict, awarding alimony and counsel fees to Annie Lee Meeks Brooks and dismissing the action by Marshall Lee Brooks for absolute divorce.

Johnson and Jenkins, by James C. Johnson, Jr., for Annie Lee Meeks Brooks.

Carlton, Rhodes & Thurston, by Graham M. Carlton, for Marshall Lee Brooks.

BROCK, Chief Judge.

All of the assignments of error by Marshall Lee Brooks are to the trial judge's instructions to the jury. In our view, no useful purpose will be served by a detailed discussion of these. We have carefully examined each argument advanced by appellant

State v. Faison

and have examined the instructions to the jury. In our opinion, the instructions fairly and impartially submit the case to the jury under applicable principles of law. Reading the instructions in context and as a whole, we find no prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. LARRY FAISON

No. 744SC462

(Filed 17 July 1974)

ON *Certiorari* to review defendant's trial before *Cohoon, Judge*, 12 June 1973 Session of Superior Court held in ONSLOW County. Heard in the Court of Appeals 28 May 1974.

This is a criminal action wherein the defendant, Larry Faison, was charged in a three-count bill of indictment, proper in form, with felonious breaking or entering, larceny, and receiving; and the jury returned a verdict of guilty to felonious breaking or entering and larceny.

From a judgment that defendant be imprisoned for not less than seven years nor more than ten years, the defendant petitioned this court for a writ of certiorari, which was allowed on 10 April 1974.

Attorney General Robert Morgan by Associate Attorney Thomas M. Ringer, Jr., for the State.

Joseph C. Olschner for defendant appellant.

HEDRICK, Judge.

Conceding he can find no error, defendant's counsel requests this court to examine the record to determine if error was committed in defendant's trial. Accordingly, we have carefully examined the record and find that the defendant had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and BAILEY concur.

Ragsdale v. Kennedy

HUGH A. RAGSDALE, SR. v. SHERMAN KENNEDY, BILL CLEVE
AND WILLIAM B. BROWN

No. 744SC412

(Filed 7 August 1974)

1. Bills and Notes § 4; Seals— seal on note — consideration

The seal on a promissory note imports a valuable consideration.

2. Reformation of Instruments § 4; Rules of Civil Procedure § 9— revision of note — mistake — insufficiency of allegation

Defendants' allegation that the provision for attorney fees in a promissory note was not stricken through because of error, oversight and mutual mistake was not sufficiently particular to support revision of the note because of mistake. G.S. 1A-1, Rule 8; G.S. 1A-1, Rule 9(b).

3. Sales § 21— fraud by seller — rights of purchaser

In a case of actionable fraud by the seller, the purchaser has the right, at his election, to affirm the contract of purchase and retain whatever property or advantage he has received under it; and while his affirmance ends his right to rescind the contract, it does not prevent him from recovering from the seller, either in an independent action or by way of counterclaim when sued by the seller for the purchase price, the damages sustained by him by reason of the seller's fraud.

4. Corporations § 13; Fiduciaries; Fraud § 7— corporate president-manager — no fiduciary duty to directors

The president-manager of a corporation does not stand in a fiduciary relationship to the corporation's directors merely by virtue of his position as president-manager; therefore, fraud or unfair dealing will not be inferred in the sale of the corporation's stock by the president-manager to the directors absent a showing of special circumstances creating such a fiduciary relationship.

5. Corporations § 13; Fraud § 9— insufficient allegations of fraud

Allegations by defendant corporate directors that plaintiff, the president and manager of the corporation, knew of the deteriorating financial position of the corporation but told defendants that the corporation was a "gold mine" were insufficient to allege active fraud by plaintiff in the sale of stock of the corporation to defendants.

Judge BAILEY dissenting.

APPEAL by defendants from *Cowper, Judge*, 11 February 1974 Session of Superior Court held in ONSLOW County. Heard in the Court of Appeals 18 June 1974.

This is an action seeking recovery on a promissory note in the amount of \$20,000.00. Judgment was rendered for the plaintiff on the pleadings.

Ragsdale v. Kennedy

Defendants appealed.

Warlick, Milsted & Dotson, by Alex Warlick, Jr., for the plaintiff.

Zennie L. Riggs, for the defendants.

BROCK, Chief Judge.

Plaintiff's complaint contains four numbered allegations as follows:

"(1) That on or about November 22, 1972, defendants executed and delivered to plaintiff a promissory note, whereby defendants promised to pay to plaintiff or order 60 days from date, the sum of Twenty Thousand Dollars (\$20,000.00), with interest thereon at the rate of six and one-half (6½) percent per annum; a copy of said note is hereto attached as Exhibit 'A.'

"(2) That defendants have paid nothing on the principal amount of said note, and have paid interest through March 7th, 1973.

"(3) That said note provides, that, in addition to the outstanding balance, the holder shall be entitled to recover reasonable attorney's fees to the extent permitted by applicable law.

"(4) That said defendants, jointly and severally, owe to the plaintiff the amount of said note, to wit, Twenty Thousand Dollars, (\$20,000.00), and interest from March 7th, 1973, at six and one-half (6½) percent per annum, and attorney's fees in the amount of Three Thousand Dollars (\$3,000.00)."

The copy of the note which was attached to the complaint shows that it was executed under seal by each defendant.

As a "FIRST DEFENSE," defendants assert that the complaint fails to state a claim upon which relief can be granted. Obviously, this "FIRST DEFENSE" does not raise an issue of fact. Also, it is obvious that it is devoid of merit.

[1] As a "SECOND DEFENSE," defendants admit the allegations of paragraphs (1), (2) and (3) of the complaint, and deny each and every other allegation. By this "SECOND DEFENSE," defendants admit the execution of the note under seal. The seal on a

Ragsdale v. Kennedy

promissory note imports a valuable consideration. *McGowan v. Beach*, 242 N.C. 73, 86 S.E. 2d 763. Defendants admit payment of interest and no payment on principal. Defendants admit the provision for attorney fees. Absent an affirmative allegation which raises an issue of fact, the foregoing admissions will entitle plaintiff to judgment on the pleadings for the principal, interest, attorney fees and costs.

Having admitted the execution and nonpayment of the note, absent an affirmative allegation which raises an issue of fact, defendants' general denial of allegation (4) of the complaint does not entitle them to a trial on the merits. Therefore, insofar as defendants' "FIRST DEFENSE" and "SECOND DEFENSE" are concerned, plaintiff is entitled to judgment on the pleadings.

[2] We will pass over for the moment a discussion of defendants' "THIRD DEFENSE" and take up their "FOURTH DEFENSE." By their "FOURTH DEFENSE," defendants assert that the provision for attorney fees in the note "were not stricken through" because of error, oversight and mutual mistake. G.S. 1A-1, Rule 8, requires that an affirmative defense shall be sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions and occurrences, intended to be proved. G.S. 1A-1, Rule 9(b), requires that the circumstances constituting mistake shall be stated with particularity. The mere statement that something was or was not done through error, oversight and mutual mistake is not sufficient to satisfy the minimum requirements for seeking the revision of a contract because of mistake. Such an allegation does not raise an issue of fact for determination.

Defendants' "THIRD DEFENSE" is as follows:

"THIRD DEFENSE: Further answering the complaint and as a defense and set off the defendants allege and say:

"1. Onslow Livestock Corporation, a North Carolina corporation, was formed in October of 1970, with an original capitalization of 45,000 shares. Raymond Smith was the President and General Manager of the business until ill health forced him to resign in December of 1970. At that time Jack Hinson became President and General Manager and managed the business until he sold his stock interest on June 6, 1972. At that time plaintiff became President and General Manager and managed the business until Novem-

Ragsdale v. Kennedy

ber 22, 1972, when he sold his stock interest to the defendants.

"2. Defendant Brown had been a stockholder since the incorporation of the business, and a board member. On June 6, 1972 defendants Kennedy and Cleve became stockholders and board members.

"3. During the period June 6, 1972 to November 22, 1972 the plaintiff, as President and General Manager of Onslow Livestock Corporation, ran the business for the corporation without holding any monthly Board of Directors meetings, which had been the procedure prior thereto, and without interference by defendant stockholders.

"4. In November 1972, prior to the date of purchase and sale of plaintiff's interest in the corporation, plaintiff had told the defendants Brown and Kennedy that the business was a 'gold mine.'

"5. That on or about November 22, 1972 defendants purchased from plaintiff for \$60,000.00 the following: (a) 12,500 shares of \$1.00 par value common stock of Onslow Livestock Corporation, (b) plus corporation notes with face value of \$29,000.00, with accrued interest at 7%, dated at various times, and payable at various dates; for \$40,000.00 cash and the \$20,000.00 note plaintiff is suing to collect.

"6. That at the time the plaintiff sold his interest in the corporation he was the President and General Manager of the corporation and held a fiduciary relationship to the defendants; and owed them the duty to fully inform them of the condition of the corporation and not to conceal any material facts.

"7. That the plaintiff knew or, by proper supervision and management of the affairs of the corporation, should have known that, during the period that he was President and General Manager of the corporation (from June 6, 1972, to November 22, 1972), the financial condition of the corporation had worsened in that:

"(a) the cash and cash on deposit of the corporation had decreased by approximately twenty thousand dollars,

Ragsdale v. Kennedy

“(b) he had borrowed for the corporation an additional \$15,000.00 from the corporation’s bank,

“(c) the liability of the corporation had increased in that:

“1. from a sight draft paying basis for purchases from Ralston-Purina Company the corporation had become indebted on an open account basis to Ralston-Purina Company in the amount of \$10,000.00,

“2. the corporation had become overdrawn in its purchase of corn from Lawrence Warehouse Systems and owed the bank \$3,910.00 for the overdraft.

“3. The demand note due to the bank had become delinquent because the monthly payment of interest had not been made when due;

“(d) the working capital of the corporation had become depleted, and there were not enough funds on hand, or to come in hand through the normal course of business, to pay the normal operating expenses of the business.

“8. That the plaintiff, at the time of the sale of his interest in the corporation to the defendants, did not inform the defendants of the above material facts and other facts necessary to give the defendants a true picture of the condition of the corporation.

“9. Soon after the sale and purchase of the interest of the plaintiff in the corporation the bank called its demand note, further reducing the working capital of the corporation, and resulted in a forced sale of the assets of the corporation.

“10. That the defendants relied on the representation of the plaintiff that the business of the corporation was a ‘gold mine’ and on his representation, by concealment of material facts, that they would be buying stock in a ‘going concern’ corporation.

“11. That the defendants were in fact deceived as to the condition of the corporation and the value of the stock of the corporation.

“12. That the defendants were damaged by the false representation and concealment of material facts by the

Ragsdale v. Kennedy

plaintiff by at least the amount that the plaintiff is suing for."

Defendants argue that the allegations of their "THIRD DEFENSE" show a fiduciary relationship between plaintiff and defendants. They argue that the president and general manager owes to the defendants, as members of the corporation's board of directors, the duty to fully inform them of the condition of the corporation and not to conceal any material facts. They argue that the allegations of their "THIRD DEFENSE" are sufficient to constitute an affirmative defense for damages, even though not denominated a counterclaim.

[3] In a case of actionable fraud by the seller, the purchaser has the right, at his election, to affirm the contract of purchase and retain whatever property or advantage he has received under it. "When he does so, the transaction is validated as to both parties, and either may sue the other to enforce any rights arising to him under the contract. In such case, the purchaser is liable to the seller for any portion of the purchase price which remains unpaid. While his affirmance ends his right to rescind the contract, it does not prevent him from recovering from the seller either in an independent action or by way of counterclaim when sued by the seller for the purchase price the damages sustained by him by reason of the fraud of the seller. As a general rule, the damages recoverable by the defrauded purchaser in such event consist of the difference between the value of the property sold as it was and as it would have been if it had come up to the fraudulent representations." *Hutchins v. Davis*, 230 N.C. 67, 52 S.E. 2d 210.

G.S. 1A-1, Rule 8(c), provides, in part, as follows: "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." If defendants' "THIRD DEFENSE" sufficiently alleges actionable fraud, we see no impediment to treating it as a counterclaim.

The final questions for resolution on this appeal are whether defendants' allegations are sufficient to show the existence of a fiduciary relationship between plaintiff and defendants at the time of the sale to defendants and are sufficient to allege constructive fraud by the plaintiff while in such fiduciary capacity; or, whether, if the allegations in the "THIRD DEFENSE" do not

Ragsdale v. Kennedy

show the existence of a fiduciary relationship, they are sufficient to allege active fraud by plaintiff.

"It is well settled that a representee has a right to rely upon representations where a confidential or fiduciary relationship exists between the parties. In such cases a high degree of frankness and fair dealing is required, and the representee cannot be charged with lack of diligence in failing to make an independent investigation, either at the time or afterward." 37 Am. Jur. 2d, Fraud and Deceit, § 254, p. 342. "It is a well-settled principle of the law of fraud, applied particularly by courts of equitable jurisdiction, that it is the duty of a person in whom confidence is reposed by virtue of the situation of trust arising out of a confidential or fiduciary relationship to make a full disclosure of any and all material facts within his knowledge relating to a contemplated transaction with the other party to such relationship, and any concealment or failure to disclose such facts is a fraud." *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202. Such a relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896. "Intent to deceive is not an essential element of such constructive fraud." *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697.

It is clear that, in the conduct of the business and in the management of the affairs of a corporation, officers and directors stand in a fiduciary relationship to the corporation and its shareholders. G.S. 55-35; *Gordon v. Pendleton*, 202 N.C. 241, 162 S.E. 546; 2 Strong, N. C. Index 2d, Corporations, § 14, p. 378; 19 Am. Jur. 2d Corporations, § 1272, p. 679. However, in the case *sub judice*, we are not dealing with the conduct of the business or the management of the affairs of the corporation. We are dealing here with the sale of stock of the corporation, owned by the president-manager, to three directors.

The general rule is that "an officer or director of a corporation does not sustain a fiduciary relation to an individual stockholder with respect to his stock, and consequently the mere failure on the part of such officer or director, in purchasing the shares from the stockholder, to disclose any inside information, will not militate against him so long as he does not actively mislead the seller or perpetrate a fraud; in other words, ordinarily, a corporate officer or director has a right to purchase

Ragsdale v. Kennedy

the stock of a shareholder therein, the same as any other person has a right to purchase such stock, and there is nothing in the mere fact that the purchaser is an officer or director of the corporation whose shares he purchases from which fraud or unfair dealing may be inferred." Annot., 84 A.L.R. 615, at 616. "A sound and equitable view has been taken that while a director or officer may not be a strict fiduciary for an individual stockholder from whom he purchases stock, yet if called upon for information concerning the affairs of the company or if he volunteers such information or become active in inducing the sale, he must speak fully and frankly and conceal nothing to the disadvantage of the selling stockholder." 19 Am. Jur. 2d, Corporations, § 1329, pp. 736-737. The same reasoning applies to sales by an officer or director of his own stock in the corporation to a stockholder. 19 Am. Jur. 2d, Corporations, § 1331, p. 738. The reasoning applies even more strongly in a sale by a president-manager to his directors who are charged with the duty of handling, and are presumed to have full knowledge of, the corporate business and affairs.

[4] In our opinion, a president-manager of a corporation does not stand in a fiduciary relationship to his directors merely by virtue of his position as such president-manager; and, absent a showing of special circumstances creating a fiduciary relation between the parties, or absent a showing of active fraud, such president-manager may sell his stock to his directors, and fraud or unfair dealing will not be inferred.

[5] An examination of defendants' "THIRD DEFENSE," considered as a counterclaim, does not disclose allegations of special circumstances creating a fiduciary relationship between them and plaintiff, nor does it disclose allegations of active fraud. There is no allegation of a deliberate concealment from defendants by plaintiff of facts peculiarly in the knowledge of plaintiff and unavailable to defendants. The only representation which defendants allege plaintiff made to them was that plaintiff, at some time prior to the sale and purchase, told Defendants Brown and Kennedy that the business was a "gold mine." It is not alleged under what circumstances this alleged representation was made. Such a vague and indefinite allegation of such a vague and indefinite representation is not sufficient to allege active fraud by plaintiff. It is remarkable also that defendants do not allege that the actual value of the stock was less than the amount they paid plaintiff for it.

Ragsdale v. Kennedy

In our opinion, defendants have failed to assert a valid defense or counterclaim. The judgment entered in favor of the plaintiff on the pleadings is

Affirmed.

Judge BRITT concurs.

Judge BAILEY dissents.

Judge BAILEY dissenting.

The majority opinion holds that defendants' "Third Defense" does not state a claim for relief and that the trial court properly granted judgment on the pleadings. I believe that the "Third Defense" does state a claim for relief, both on the ground of actual fraud and on the ground of constructive fraud, and therefore I dissent.

The courts of North Carolina have often held that fraud may be committed by concealing the truth as well as by making a false statement. In *Isler v. Brown*, 196 N.C. 685, 146 S.E. 803, fraud was found to exist when defendant sold an automobile to plaintiff without disclosing that it was subject to a chattel mortgage. The Supreme Court stated:

"It is a rule of equity, as well as of law, that a *suppressio veri* is equivalent to a *suggestio falsi*; and where either the suppression of the truth or the suggestion of what is false can be proved, in a fact material to the contract, the party injured may have relief against the contract."

Id. at 686, 146 S.E. at 804. In *Brooks v. Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454, defendant dug a large hole in the ground, filled it with debris, covered the debris with soil, and built a house where the hole had been. He sold the house to plaintiffs without informing them that the house did not have a solid foundation. The court allowed plaintiffs to recover damages for fraud, stating:

"Where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser,

Ragsdale v. Kennedy

the vendor is bound to disclose such facts, and make them known to the purchaser.”

Id. at 217, 116 S.E. 2d at 457. Other cases in which the Supreme Court has granted relief for nondisclosure of material facts, or held that such relief would be available in appropriate circumstances, include *Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135; *Manufacturing Co. v. Taylor*, 230 N.C. 680, 55 S.E. 2d 311; *Lunn v. Shermer*, 93 N.C. 164; and *Brown v. Gray*, 51 N.C. 103. In addition, see Prosser, Torts, 4th, § 106, at 697. Courts of other states have held that a buyer or seller of stock may be guilty of actual fraud when he fails to disclose material facts affecting the value of the stock. *Neuman v. Corn Exch. Nat'l Bank & Trust Co.*, 356 Pa. 442, 51 A. 2d 759 (1947); *Chandler v. Butler*, 284 S.W. 2d 388 (Tex. Civ. App. 1955).

In the present case, if the allegations of defendants' "Third Defense" are taken as true, plaintiff knew that the financial condition of Onslow Livestock Corporation had deteriorated rapidly since he became president. Obviously this fact materially affected the value of the corporation's stock. Defendants were not aware of the corporation's poor financial condition, because plaintiff concealed it from them and failed to hold directors' meetings. When defendants purchased stock in the corporation from plaintiff, plaintiff did not inform them that the corporation was in financial difficulties, but instead told two of the defendants "that the business was a 'gold mine.'" In my judgment these allegations are sufficient to state a claim for relief on the ground of actual fraud.

In addition, defendants' "Third Defense," when construed in its best light for defendants, states a claim for relief on the ground of constructive fraud. When a corporate officer buys or sells stock in his corporation, while having knowledge of special facts which materially affect the value of the stock, he has a duty to disclose these special facts to the person with whom he is trading. When an officer realizes that a financial crisis is on the horizon, he may not use his position of trust for personal gain by selling his stock to an outsider for more than it is worth. While his position is not technically that of a fiduciary, he nevertheless stands in a special relation to his corporation and its stockholders, and he is required to be open and candid in his dealings with them. The violation of this duty is constructive fraud. *Strong v. Repide*, 213 U.S. 419 (1909); *Mansfield Hardwood Lumber Co. v. Johnson*, 263 F.

Electric Co. v. Newspapers, Inc.

2d 748 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959); *Oliver v. Oliver*, 118 Ga. 362, 45 S.E. 232 (1903); *Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E. 2d 601 (1967); *Nichol v. Sensenbrenner*, 220 Wis. 165, 263 N.W. 650 (1936); Lattin, Corporations 2d, § 81, at 296-98; Robinson, N. C. Corp. Law, § 95. While Rule 10b-5 of the Securities and Exchange Commission is not applicable to the present case, it is based on the same principle. See *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833 (1968), *cert. denied*, 394 U.S. 976 (1969); *Speed v. Transamerica Corp.*, 99 F. Supp. 808 (D. Del. 1951).

I am of the opinion that there were issues of fact for determination and that the Superior Court should not have granted judgment on the pleadings.

CAPE FEAR ELECTRIC COMPANY, INC. v. STAR NEWS NEWSPAPERS, INC., ORIGINAL DEFENDANT, AND FRANK I. BALLARD, HERBERT P. MCKIM AND ROBERT W. SAWYER, T/A BALLARD, MCKIM & SAWYER, AIA ARCHITECTS, ADDITIONAL DEFENDANTS AND THIRD PARTY PLAINTIFFS v. HENRY VON OESSEN & ASSOCIATES, INC., THIRD PARTY DEFENDANTS

No. 735DC438

(Filed 7 August 1974)

1. Contracts § 12— construction of contracts — question for court or for jury

Where the language of a contract is plain and unambiguous, the court rather than the jury will declare its meaning, but where the language employed by the parties is ambiguous, the jury may be called upon to determine the true intent of the parties from the words employed by them to express their agreement.

2. Contracts § 27— action to recover increased construction costs — absence of change order

In a contractor's action to recover the increased cost of installing electrical conduit rather than electrical metallic tubing to house electrical circuits running in concrete floor slabs wherein the contract failed to state clearly and expressly whether the conduit or the metallic tubing was required, the trial court properly directed a verdict for defendant owner where the evidence showed that the contract required that any change in the contract sum be authorized by a change order and that no change order was issued changing the contract sum to reflect the increased cost to the contractor of installing conduit rather than metallic tubing, and there was no evidence that the owner agreed to any modification or waiver of its rights under the contract provisions requiring a change order.

Electric Co. v. Newspapers, Inc.

APPEAL by plaintiff from *Barefoot*, District Judge, 27 November 1972 Civil Session of District Court held in NEW HANOVER County.

Plaintiff, Cape Fear Electric Company, Inc. (Contractor), was the low bidder and on 15 April 1969, signed a written contract with original defendant, Star News Newspapers, Inc. (Owner), to perform for \$82,961.00 (subsequently increased by Change Orders to \$86,365.43) the electrical work called for in drawings and specifications provided by additional defendants, Ballard, McKim & Sawyer (Architects), for the construction of a newspaper office building for Owner. In this action Contractor seeks to recover from Owner an additional \$4,716.84 which Contractor alleges is the increased cost of installing electrical conduit rather than electrical metallic tubing (EMT) to house the electrical circuits where they run through or under the concrete floor slabs in the building. Electrical conduit is a heavier and more expensive material and costs more to install than EMT, and Contractor contends the use of the more expensive material was not required by the contract specifications. In its complaint, Contractor alleged that it installed the more expensive material pursuant to instructions from Owner's engineers, that the use of electrical conduit was not required by the specifications or contract and was not included in Contractor's bid, and by reason of these matters Owner is indebted to Contractor in the amount of \$4,716.84 with interest.

Owner filed answer denying any indebtedness to Contractor, moved to make Architects additional defendants, and filed a cross-action against Architects in which Owner alleged that in the event the court should determine that Contractor is entitled to any additional monies, the additional cost of the building to the Owner is a liability of Architects for negligence in preparing the specifications or for breach of contract in failing to provide the services required of them under their contract with Owner. Architects in turn filed answer denying liability on account of Owner's cross-action, moved to make Henry Von Oesen & Associates, Inc. (Engineers), a third party defendant, and filed a third party complaint against Engineers in which Architects alleged they employed and relied upon Engineers to prepare the plans and specifications for the electrical work, that Engineers had interpreted and applied the plans and specifications to require the use of conduit instead of EMT for installation of branch circuits in or under concrete floor slabs

Electric Co. v. Newspapers, Inc.

in the building, and if Contractor is entitled to recover anything of Owner and Owner is entitled to recover anything of Architects, both of which Architects deny, then any such recovery against Architects would be due solely to the negligence of Engineers in the preparation and interpretation of the plans and specifications for the electrical work. Engineers answered Architects' third party complaint, denying any negligence on the part of Engineers and alleging that the plans and specifications clearly set forth that the branch circuits involved should be constructed with electrical conduit rather than EMT and that this was known to Contractor at the time of the bidding and to Architects when they reviewed the plans and specifications prior to submission of the same for bids.

Upon the trial before judge and jury, Contractor introduced in evidence its written contract with Owner, including the specifications and drawings which were made part of the contract. Paragraph 16.32 of the relevant electrical specifications reads:

"16.32 BRANCH CIRCUITS: Branch circuits will be installed in conduit or electrical metallic tubing with type THW insulated conductors size and number as indicated on the contract drawings."

The contract drawings relating to the electrical work, which were prepared by Engineers, indicated by solid lines the location of the raceways carrying electrical circuits concealed in walls or ceiling and by broken lines the location of raceways concealed in or below the floors, but failed to indicate whether conduit or EMT was to be installed in either location. Paragraph 16.10 of the specifications provided that rigid conduit and EMT should be installed in accordance with pertinent Articles of The National Electrical Code. Art. 348 of that Code, relating to EMT, provided that EMT should not be used "where during installation or afterward, it will be subject to severe physical damage," and that it should not be installed in concrete or in areas subject to severe corrosive influences "[u]nless made of a material judged suitable for the condition, or unless corrosion protection approved for the condition is provided."

Contractor's evidence also showed: Throughout the construction Contractor contended that its contract allowed use of EMT in all circuits. Engineers made no objection to use of EMT in walls and ceilings, but when Contractor started to

Electric Co. v. Newspapers, Inc.

install EMT in floors prior to pouring of concrete, Engineers by letter dated 4 June 1969 informed Contractor as follows:

“Electrical metallic tubing shall not be installed in concrete slabs. It may be used in dry walls or ceiling areas only.”

Contractor immediately took the position this constituted a change in the contract and on 13 June 1969, wrote a letter to Architects quoting an increased price of \$4,716.84 and requesting a formal Change Order recognizing this increase in contract price, but no Change Order was forthcoming. On 19 June 1969 Contractor again wrote to Architects, acknowledging receipt of a letter of 17 June from the Architects and advising that Contractor was “proceeding with the installation of rigid galvanized conduit for branch circuits in slabs as required by [Architects’] letter,” but was doing so under protest and reserving the right to have the dispute settled by arbitration as provided in the general conditions of the project specifications. However, no arbitration of the dispute occurred. There was also evidence that Contractor had completed its work under the contract, installing rigid conduit instead of EMT in the concrete floor slabs, and that it had been paid in full for all work as provided in the contract but had received no payment for the increased cost of installing the conduit instead of EMT in the floor slabs.

At the close of Contractor’s evidence the Owner moved for a directed verdict, and all parties stipulated that Owner’s Exhibits 1, 2 and 3 could be introduced and considered by the judge in his determination of the motion. These exhibits, together with plaintiff’s exhibits, showed the following:

After Contractor wrote to Owner on 29 May 1970 stating that the project was “100% complete” and making a “requisition for final payment” which included the added conduit cost, Architects wrote to Contractor on 24 June 1970, refusing to certify final payment and instructed Contractor:

“Do not include the added charge of \$4,716.84 for conduit in the slab. This has not been approved as you know and our position on this question has been previously stated.”

Electric Co. v. Newspapers, Inc.

On 18 August 1970, Contractor instituted this action against Owner to recover the \$4,716.84 and thereafter, in a letter dated 4 November 1970, wrote to Owner as follows:

"The following is our final billing on the above job.

Contract Amount to date	\$86,365.43
Less previous payments	77,728.89
Total due	<u>\$ 8,636.54"</u>

These figures, which did not include the disputed \$4,716.84, were subsequently certified by Architects, and by check dated 28 January 1971, issued by Owner and cashed by Contractor, Owner paid Contractor the sum of \$8,636.54 shown as the "Total Due" in Contractor's letter to Owner of 4 November 1970.

The court granted Owner's motion for a directed verdict dismissing Contractor's action, and Contractor appealed.

Poisson, Barnhill, Butler & Martin by M. V. Barnhill, Jr., for plaintiff appellant.

Stevens, McGhee, Aycock, Morgan & Lennon by Ellis L. Aycock for original defendant appellee.

PARKER, Judge.

[1] Where the language of a contract is plain and unambiguous the court rather than the jury will declare its meaning, *Yates v. Brown*, 275 N.C. 634, 170 S.E. 2d 477, but where the language employed by the parties is ambiguous the jury may be called upon to determine the true intent of the parties from the words employed by them to express their agreement, *Lumber Co. v. Construction Co.*, 249 N.C. 680, 107 S.E. 2d 538. Here, the written contract failed to state clearly and expressly whether the heavier and more expensive rigid conduit or the lighter and less costly EMT was required for carrying the electrical circuits through the concrete floor slabs, and careful analysis of all of the contract documents leaves the answer in doubt. At the least, a factual question was presented for the jury to determine whether the EMT which Contractor proposed to install in the floors would be "subject to severe physical damage," either "during installation or afterward," and whether it was "made of a material judged suitable for the condition," requirements made by The National Electrical Code for use of

Electric Co. v. Newspapers, Inc.

EMT. Thus, if this appeal presented solely the question of which material was required by the contract, the matter would have been one for the jury to determine and directed verdict would have been improper. Such a case would have been presented had Contractor persisted in installing EMT and Owner had thereafter contended this constituted a breach of the contract. Here, however, Contractor did not install EMT but installed the more expensive conduit, and the question presented by this appeal is whether, after viewing the evidence in the light most favorable to Contractor, the Contractor has shown any right to recover from the Owner the increased cost of the more expensive material. We hold that no such showing was made and that directed verdict for Owner was therefore appropriate.

In so holding, we do not base our decision on the "final billing" contained in Contractor's letter to Owner of 4 November 1970 showing a "Total Due" of \$8,636.54 and the subsequent payment and acceptance of that amount. This was one of the grounds upon which the trial judge relied in directing verdict for the Owner, but in our opinion the facts of this case distinguish it from the situation presented in *Phillips v. Construction Co.*, 261 N.C. 767, 136 S.E. 2d 48, in that regard. Article 9 of AIA Document A201, General Conditions of the Contract for Construction, which was incorporated into the contract between Contractor and Owner, contains the following:

"9.7.6 The acceptance of final payment shall constitute a waiver of all claims by the Constructor *except those previously made in writing and still unsettled.*" (Emphasis added.)

Here, the disputed claim for \$4,716.84 had been previously made in writing and was still unsettled. In addition, this very action for recovery of the extra cost of installing the more expensive conduit had already been filed and was pending in court when Contractor's letter of 4 November 1970 showing a total due of \$8,636.54 was sent, Contractor had been expressly directed to omit its claim for the extra cost of the conduit from its billing to Owner, and there was no dispute that Contractor was entitled to receive the \$8,636.54 as billed. Under these circumstances we do not believe that any party involved intended or understood that this lawsuit was being settled or that Contractor was waiving the claim which is the basis of this lawsuit by the billing for and the payment and acceptance of the \$8,636.54.

Electric Co. v. Newspapers, Inc.

[2] In our opinion the order directing verdict dismissing Contractor's claim was required by other provisions of the contract. Article 12 of the General Conditions of the Contract for Construction deals with changes in the work and provides that all such changes shall be authorized by Change Order. Article 12 contains the following:

"12.1.2 A Change Order is a written order to the Contractor signed by the Owner and the Architect, issued after the execution of the Contract, authorizing a Change in the Work or an adjustment in the Contract Sum or the Contract Time. Alternatively, the Change Order may be signed by the Architect alone, provided he has written authority from the Owner for such procedure. *The Contract Sum and the Contract Time may be changed only by Change Order.*

* * * * *

"12.2 CLAIMS FOR ADDITIONAL COST OR TIME

"12.2.1 If the Contractor wishes to make a claim for an increase in the Contract Sum or an extension in the Contract Time, he shall give the Architect written notice thereof within a reasonable time after the occurrence of the event giving rise to such claim. This notice shall be given by the Contractor before proceeding to execute the work, except in an emergency endangering life or property in which case the Contractor shall proceed in accordance with Sub-paragraph 10.3.1. No such claim shall be valid unless so made. If the Owner and the Contractor cannot agree on the amount of the adjustment in the Contract Sum or the Contract Time, it shall be determined by the Architect. *Any change in the Contract Sum or Contract Time resulting from such claim shall be authorized by Change Order.*" (Emphasis added.)

In the present case, all of the evidence shows that no Change Order was issued changing the Contract Sum to reflect the increased cost to Contractor of installing conduit rather than EMT, and there is no evidence that Owner agreed to any modification of or waiver of its rights under the foregoing contract provisions. The case then comes down to this: If the correct interpretation of the contract specifications is as Owner, Architects and Engineers have consistently contended, and Contractor was required by these specifications to install rigid conduit rather than EMT in the floors, then when Contractor did so,

Electric Co. v. Newspapers, Inc.

it did no more than it was originally obligated to do and is entitled to no extra compensation. On the other hand if the correct interpretation is as Contractor contends, and Contractor could comply with those specifications by installing the less expensive EMT, then a Change Order was required before Owner could be bound to pay for the increased cost incurred by Contractor when it installed the more expensive conduit. Although Contractor installed the conduit only at the insistence of Engineers, and there was evidence that Owner relied upon Architects who in turn relied upon Engineers to prepare and interpret the contract specifications relating to the electrical work, there was no evidence that Owner appointed Engineers its agent or in any other manner authorized Engineers to obligate Owner to any increase in the amount Owner was bound to pay Contractor for work performed under the contract. For example, had Engineers insisted that the specifications required Contractor to install conduit made of gold and had Contractor done so even though under protest, we suppose no one would contend that Owner should be bound to pay Contractor for its increased cost absent a Change Order issued in the manner and as authorized in the contract between Owner and Contractor. While the present case is not so extreme, the same principle applies. We conclude that the order directing verdict dismissing Contractor's claim against Owner was properly entered.

In addition to assigning error to entry of that order, Contractor made assignments of error to rulings of the trial judge admitting or excluding evidence. However, it is not necessary for us to discuss these, since had the judge's ruling in each instance been as Contractor contends it should have been, directed verdict for Owner would still have been properly entered. Accordingly, the judgment appealed from is

Affirmed.

Judges BRITT and MORRIS concur.

Hutchins v. Honeycutt

LEE HUTCHINS v. WILENA GOODSON HONEYCUTT

No. 7428SC466

(Filed 7 August 1974)

Specific Performance; Vendor and Purchaser § 5— contract to sell land — specific performance — overreaching by buyer — insufficiency of evidence

The trial court erred in denying specific performance of a contract for the sale of land on the ground that the contract was procured by overreaching on the part of plaintiff buyer where the evidence showed only that the plaintiff knew that defendant seller's husband was an invalid and that defendant had recently been treated for cancer, that plaintiff and defendant discussed and agreed on the sale at the home of defendant's brother, that defendant signed the agreement of her own free will at an attorney's office and that defendant refused to abide by the contract because her husband did not want her to sell the land, and where there was no contention or evidence that the purchase price agreed upon was not fair and reasonable.

Judge MORRIS dissenting.

APPEAL by plaintiff, after trial before *Friday, Judge*, 14 January 1974 Session of Superior Court held in BUNCOMBE County, assigning error to order entered by *Martin, (Harry C.), Judge*, on 15 June 1973.

This action was instituted to compel defendant to convey a tract of land, about 35 acres, to plaintiff for \$35,000.00 pursuant to a written contract executed by the parties. Plaintiff had paid \$100.00, and the balance was due upon delivery of the deed. The contract called for completion of the transaction on or before 28 April 1972. By a letter dated 22 April 1972, defendant advised plaintiff the sale would not be made. Plaintiff urged defendant to comply with the contract by telephone and through counsel.

The verdict was as follows:

“FIRST: Did Wilena Goodson Honeycutt execute the paper writing set out in the Complaint?

ANSWER: Yes.

SECOND: Is \$35,000.00 a reasonable and fair price for the property in question?

ANSWER: Yes.

Hutchins v. Honeycutt

THIRD: Did Wilena Goodson Honeycutt breach said contract?

ANSWER: Yes.

FOURTH: Is the plaintiff, ready, able and willing to carry out his part of said contract?

ANSWER: Yes."

Judge Martin refused to enter judgment ordering specific performance and, instead, issued an order with the following conclusions:

"That, although the contract found by the jury is a lawful contract and the Court could not set the same aside, this Court does find that the contract was procured by overreaching the defendant at a time at which her mental and physical condition was impaired and when she was under emotional stress, and the agreement was procured with a degree of unfairness which induces this Court to withhold its aid in the specific performance of the agreement, this Court being of the opinion, in the exercise of its judicial discretion (sic), that under the rules set forth in *Knott vs. Cutler*, 224 N.C., p. 430, that equity should not be granted to the plaintiff to require the specific performance of this agreement.

Upon the foregoing findings of fact and conclusions of law, IT IS THEREFORE HEREBY ORDERED, in the exercise of the discretion of the Court, that the plaintiff's prayer for specific performance of the contract in question be, and the same is hereby denied.

IT IS FURTHER ORDERED that this cause shall be placed upon a subsequent calendar for trial before a jury upon the following issue: 'What amount is the plaintiff entitled to recover from the defendant?' "

At the trial on the issue of damages, the jury answered the issue "nothing."

Plaintiff, having duly preserved his exceptions, appealed from the order of Judge Martin denying specific performance.

S. Thomas Walton for plaintiff appellant.

Morris, Golding, Blue and Phillips by William C. Morris, Jr., for defendant appellee.

Hutchins v. Honeycutt

VAUGHN, Judge.

The only question presented is, as posed by appellant, "Is the plaintiff entitled to specific performance of the agreement entered into by the plaintiff and the defendant?"

The decision to grant or withhold specific performance must be exercised in accordance with settled rules and principles applied to the facts and circumstances of the case being tried. The discretion involved is not left to the mere will of the court in the sense that the court could make a different decision in two cases that are exactly alike.

"As to when specific performance will be enforced in this jurisdiction, their rule is clearly stated in *Combes v. Adams*, 150 N.C., 64, 63 S.E., 186, where Hoke, J., speaking for the Court, said: 'It is accepted doctrine that a binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced. *Rudisill v. Whitener*, 146 N.C., 403; *Boles v. Caudle*, 133 N.C. 528; *Whitted v. Fuquay*, 127 N.C., 68. This last decision being to the effect that mere inadequacy of price, without more, will not as a rule interrupt or prevent the application of the principle.' This doctrine or principle has been cited with approval in *Ward v. Albertson*, 165 N.C., 218, 81 S.E., 168; *Thomason v. Bescher*, 176 N.C., 622, 97 S.E., 654; and *Harper v. Battle*, 180 N.C., 375, 104 S.E., 658." *Knott v. Cutler*, 224 N.C. 427, 31 S.E. 2d 359.

In *Knott*, plaintiff, a man of wide business experience with knowledge of the value of farm land, contracted with an elderly widow with little business experience to purchase the widow's farm which was worth \$5,250.00 for \$2,300.00. The widow had great confidence in plaintiff because of her dealings with him. Her late husband had had business dealings with plaintiff for many years and sold most of his tobacco in plaintiff's warehouse. The Supreme Court reversed the trial judge and ordered that a decree for specific performance be entered. The Court said, "It must be conceded that the defendant made a bad bargain and that the consideration is inadequate, but, since the agreement for the sale of the property was not procured by fraud on the part of the plaintiff, it is a binding agreement, and we believe the ends of justice will be subserved by granting a decree of specific performance."

Hutchins v. Honeycutt

In *Knott*, the Court quoted with apparent approval from a section of American Jurisprudence, as follows:

“‘As a general rule, when it appears that a contract was unfairly procured by overreaching or overkeenness on the plaintiff’s part, or was induced or procured by means of oppression, extortion, threats, or illegal promises on his part, the plaintiff cannot obtain specific performance. These matters need not be of such character as would justify a court of equity in rescinding the contract or a court of law in refusing relief. There is a difference between that degree of unfairness which will induce a court of equity to interfere actively or by setting aside a contract and that which will induce a court to withhold its aid. Relief may be denied upon ground that the contract is harsh, unjust, or oppressive, regardless of any actual fraud, and regardless of the fact that the contract is valid.’”

At the outset we note that defendant has never pled or testified that she had been treated unfairly. In her answer (1) she denied knowledge of the execution of the contract sued on, (2) alleged that her agreement was conditional on her husband’s agreement to the contract and pled that her husband refused to join in the execution of the contract and, therefore, performance was impossible and (3) alleged that plaintiff failed to tender the purchase price.

Defendant is a college graduate, having received a B.S. degree from Western Carolina University. In addition she has taken extension and inservice courses. She has engaged in her profession as a schoolteacher for a number of years. She was employed as a teacher at the time she entered into the contract and was still so employed when the case was tried. On 17 December 1971, she had surgery for cancer and took 25 cobalt treatments. The treatments were completed before the time she made the contract and had returned to work. She inherited most of the property in question from her parents. She acquired title to the remaining 11 acres by deed from her husband who had purchased it from her brother, Bill Goodson. She owned the land in her own right. Her parents had owned the land for a long number of years prior to their death. Defendant knew plaintiff before the date of the contract but did not know him very well. She knew that he owned a tract of land located about 100 yards from the parcel she contracted to sell. As a result of a conver-

Hutchins v. Honeycutt

sation with the brother, Bill Goodson, she agreed to meet with plaintiff at her brother's home for the purpose of discussing a sale of the property. Her brother had told her that plaintiff was interested in purchasing the property. Prior to that meeting, she and plaintiff had never discussed a sale of the land to plaintiff.

Plaintiff had discussed the terms of the sale with defendant's brother on several occasions and had reached an understanding with him as to what the bargain would be. Plaintiff knew defendant, had heard that her husband was an invalid and that she had cancer. He had made arrangements for a loan and, at all relevant times, was ready and willing to pay for the property.

Defendant denied that another brother, Arloe Goodson, who used the property for pasture, had tried to buy it for a sum substantially less than that offered by plaintiff.

Defendant's testimony relative to her conversation with plaintiff at her brother's (Bill Goodson) home, was in part, as follows:

"I had an occasion to see Mr. Hutchins at my brother's home in Newbridge sometime in the early part of 1972. That was about the latter part of March, I would say. I had not seen him or discussed it with him at any time prior to that a sale of my property. There was a discussion about the sale of my property at that time. My husband was not with me at the time and the reason he wasn't because he was not physically able. I happened to go to my brother's house on that occasion because I was called and asked to meet Mr. Hutchins there. My brother Bill Goodson called me. During the discussion I had there with Mr. Hutchins, I made the statement about my husband that he would have to agree to the sale and would have to sign the deed. I do not remember Mr. Hutchins' exact words to that. He did not make any objection to that at that time."

Plaintiff gave defendant a cashier's check for \$100.00 dated 28 March 1974. Defendant was told to go to the law office of Floyd Brock the next day to sign the papers. Brock had been employed to draft the contract and examine the title for plaintiff. The next day, at about 4:30 p.m., she did go to the lawyer's office to sign the papers. Plaintiff was not present at that time.

Hutchins v. Honeycutt

Defendant testified, "I said I would go up there. I wasn't forced to go up there. And I went up there for the purpose of signing a paper that had to do with the sale of my property for the sum of \$35,000.00 and I knew that." She couldn't recall whether she was left alone to read the contract but did recall that Mr. Brock was present when she signed the contract. Brock witnessed her signature. She was not rushed. She had the opportunity to read all or so much of the contract as she wanted to before she signed it. "I looked at the paperwriting close enough before I signed it to see the purchase price was inserted in the blanks of \$35,000.00." Her name alone appeared at the top of the paper, and the property is in her name alone and not her husband's. She said, "I was not coerced. I signed it of my own free will." "I was teaching school in March and April of 1972. My mind was not affected by the cobalt treatments that I had previously had. If it had I would not have been working." *Thereafter* she discussed the matter with her husband and one of her children.

In a letter dated 22 April 1972, defendant wrote plaintiff as follows:

"Dear Mr. Hutchins:

My son visited with us over the past weekend and we discussed the suggested sale to you of the old home place with my husband. He will not agree to the sale or to sign a deed out of the family.

The physical and mentral (sic) strain I have been under for the past months has been most difficult. I am returning your check, uncashed, and am informing you that the sale of this property cannot be made."

She testified that when, in her letter, she said that she had been under a physical and mental strain, she was referring to the operation and treatments for cancer she had received in 1971. After plaintiff received the letter he attempted to telephone defendant but she refused to talk with him and suggested that he contact her attorney. Plaintiff's attorney wrote defendant and reminded her of her obligations under the contract. Defendant refused to comply, and the litigation followed.

The jury found that the purchase price of \$35,000.00 was fair and reasonable. Defendant has never contended otherwise. She insists that the fair market value of the property is not

Hutchins v. Honeycutt

more than \$35,000.00. Thus, even she does not say that she is a victim of a sharp or unfair bargain or that plaintiff attempted to deceive her. There is nothing in the defendant's testimony which indicates that even she believes that her treatment for cancer or any other defect in her physical or mental condition contributed to or caused her to decide to execute the contract. Defendant did not testify or offer any evidence which would so much as suggest that plaintiff, or anyone else, even *urged* her to sell the property. Defendant does not suggest that her brother, Bill Goodson, acted other than for her and in her best interest. The recitals in the Judge's order refer to the fact that the land had been in defendant's family for a long number of years. Defendant does not suggest that she considers this a reason why she should not sell her land.

In fact, there is not a scintilla of evidence from defendant that she does not want to sell her land on the terms called for in the contract. The evidence is that her husband does not want her to sell and this is the only reason she has assigned for her failure to abide by her contract. The wishes and desires of defendant's husband, if she considered them to be important, were matters for her consideration before she agreed to sell and accepted plaintiff's earnest money and before, on a later day, she voluntarily went to the office of an attorney to formally execute the written contract. The wishes of defendant's husband afford no basis for the court to deprive plaintiff of the benefits of his contract.

One may be too crafty or may get such an unfair advantage of another by sharp, tricky or deceitful means (not amounting to the fraud that would vitiate the entire contract) that will justify the court in concluding, on facts found, that he has overreached himself, that is, that he has defeated himself by seeking to gain too much by those improper means. In that event the court may withhold specific performance and leave the offender to his damages. There is no evidence in this record to suggest that plaintiff has done anything which could be held to defeat his right to have his contract enforced according to its terms.

The judgment is reversed. The case is remanded to the end that a decree for specific performance may be entered against defendant.

Hutchins v. Honeycutt

Reversed and remanded.

Judge BAILEY concurs.

Judge MORRIS dissents.

Judge MORRIS dissenting.

Plaintiff's sole assignment of error is to the order denying specific performance. He contends that, absent a finding that the contract was procured by fraud, mistake, undue influence or oppression, specific performance should be granted when the plaintiff shows the contract to be valid. He takes the position that the "overreaching" which was found by the court to have been practiced by the plaintiff on the defendant at a time at which her mental and physical condition was impaired and when she was under emotional stress must be tantamount to fraud. Accordingly, the plaintiff contends, the evidence before the court is insufficient to justify a conclusion that the contract was procured by overreaching amounting to fraud.

It is well established in this State that specific performance of a contract is granted in the sound discretion of the court and not as a matter of absolute right. This discretion is to be exercised upon a consideration by the court of the circumstances of the case, with a view of subserving the ends of justice. *Knott v. Cutler*, 224 N.C. 427, 31 S.E. 2d 359 (1944). "Where the entire evidence shows that specific performance would be harsh, inequitable, and unjust, the plaintiff will be left to his action for damages." *Shakespeare v. Land Co.*, 144 N.C. 516, 525, 57 S.E. 213 (1907).

In the case before us, the court made no findings of fact of fraud, mistake, undue influence or oppression. It appears to me that the circumstances of this case bring it within the application of *Knott v. Cutler*, *supra*, where the Court stated:

"As a general rule, when it appears that a contract was unfairly procured by overreaching or overkeenness on the plaintiff's part, or was induced or procured by means of oppression, extortion, threats, or illegal promises on his part, the plaintiff cannot obtain specific performance. . . . Relief may be denied upon ground that the contract is harsh, unjust, or oppressive, regardless of any actual fraud, and regardless of the fact that the contract is valid.'" (Citing 49 Am. Jur., § 51, p. 66).

State v. Edwards

The court, having heard the evidence, observed the parties and the witnesses, found that the plaintiff procured this contract by overreaching the defendant at a time when she was under extreme mental and physical stress. This finding is supported by competent evidence of the plaintiff's condition and of the defendant's awareness of that physical and emotional condition. I would hold that the trial court did not abuse its discretion by ruling that the contract was procured by overreaching on the part of plaintiff and in denying specific performance of the contract.

STATE OF NORTH CAROLINA v. HAYWOOD EDWARDS

No. 748SC148

(Filed 7 August 1974)

1. Criminal Law § 84; Searches and Seizures § 3— search warrant lost — proof of contents by photostatic copy

Where the original search warrant was shown to be lost, the trial court properly allowed the State to prove the contents of the warrant by a photostatic copy of the original which had been made by a deputy clerk of superior court.

2. Searches and Seizures § 3— sufficiency of affidavit for warrant

An affidavit describing with particularity the house and vehicle allegedly containing nontaxpaid whiskey and stating that "A confidential and reliable informant who has given reliable information says that there is nontaxpaid whiskey at above location at this time" was sufficient to establish probable cause for issuance of a warrant to search for nontaxpaid whiskey.

Judge PARKER dissenting.

APPEAL by defendant from *Rouse, Judge*, 27 August 1973 Session of Superior Court held in LENOIR County. Heard in the Court of Appeals 16 April 1974.

Defendant was charged in a warrant with unlawful possession of ten pints of tax-paid liquor for the purpose of sale. After trial and conviction in the District Court, he appealed to the Superior Court for trial *de novo* and again pled not guilty. The State's evidence showed: Deputy sheriffs, armed with a warrant to search defendant's house and Chevrolet station wagon, executed the search and found four pints of gin and six pints of whiskey in the station wagon. Defendant testified that

State v. Edwards

he owned eight pints of the liquor, which were found on the floorboard in the passenger compartment of the station wagon; but he denied any knowledge of two pints, which the officers testified they found in the spare tire section of the station wagon. Defendant denied possessing any of the liquor for the purpose of sale.

The jury found defendant guilty as charged; and from judgment imposed on the verdict, he appealed.

Attorney General Robert Morgan, by Associate Attorney William A. Raney, Jr., for the State.

Turner & Harrison, by Fred W. Harrison, for the defendant.

BROCK, Chief Judge.

[1] On defendant's objection to evidence obtained by the search, a *voir dire* examination was held, from which it appeared that the original search warrant was not in the file and had not been seen since the case was tried in the District Court. The judge found as a fact that it was lost and, for purposes of passing upon its validity, considered a photostatic copy, which the State's witness testified had been made by a deputy clerk of court. In this procedure, we find no error. "Where the search is made under conditions requiring the issuance of a search warrant, and it is attempted, over objection, to justify the search and seizure by the possession of a valid search warrant in the hands of the searchers, the State must produce the search warrant, or, if it has been lost, the State must prove such fact and then introduce evidence to show its contents and regularity on its face, unless the production of the warrant is waived by the accused." *State v. McMilliam*, 243 N.C. 771, 773, 92 S.E. 2d 202, 204. There could hardly be better evidence of the contents of the search warrant than a photostatic copy made from the original, and the court properly considered the photostatic copy in the present case.

[2] Defendant argues that the affidavit to obtain the search warrant is not sufficient to establish probable cause. The affidavit states that affiant, a deputy sheriff, has probable cause to believe that defendant had non tax-paid whiskey on his premises at Route 2, Grifton. The affidavit further states:

"The property described above is located On the Premises and in a 1965 Chevrolet described as follows: A red

State v. Edwards

frame farm house located 8/10 of a mile west of NC 11 on rural unpaved road 1714 and a 1965 Chevrolet station wagon Lic #Ezm771. The facts which establish probable cause for the issuance of a search warrant are as follows: A confidential and reliable informant who has given reliable information says that there is non tax paid whiskey at above location at this time."

The affidavit describes the house and its precise location. It describes, with particularity, the make, style, year and license number of the vehicle. It further states that the contraband is at the described location at the time the affidavit was signed. It is obvious from the unequivocal information given by the informant that the accusation was not casual rumor, but was sufficiently substantial to justify a finding of probable cause by the magistrate.

Justice Higgins answered the argument urging technical requirements of elaborate specificity for affidavits to secure search warrants in *State v. Ellington*, 284 N.C. 198, 200 S.E. 2d 177. He quoted from opinions of the Supreme Court of the United States as follows:

"In *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584, the Court said: 'In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.'

"The latest pronouncement on the question before us comes from the decision of the Supreme Court of the United States in *U. S. v. Harris*, 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075:

'In evaluating the showing of probable cause necessary to support a search warrant, against the Fourth Amendment's prohibition of unreasonable searches and seizures, we would do well to heed the sound admonition of *United States v. Ventresca*, 380 U.S. 102 (1965):

"[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not ab-

State v. Edwards

stract. If the teaching of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." 380 U.S., at 108.' "

No error.

Judge BAILEY concurs.

Judge PARKER dissents.

Judge PARKER dissenting:

I agree that the contents of the search warrant were properly proved by use of the photostatic copy in this case, but I cannot find the warrant valid under *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969) and *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964). Until those decisions are modified or overruled by the United States Supreme Court they are binding on this Court, and I am unable to join in simply ignoring their teachings. Our own Supreme Court in *State v. Campbell*, 282 N.C. 125, 129, 191 S.E. 2d 752, 755 (1972) has succinctly summarized these as follows:

"The affidavit [indicating the basis for the finding of probable cause by the issuing magistrate] may be based on hearsay information and need not reflect the direct personal observations of the affiant; *but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer, whose identity need not be disclosed, was credible and his information reliable.* [Citations omitted.]

State v. Edwards

“Whether the affidavit is sufficient to show probable cause must be determined by the issuing magistrate rather than the affiant. This is constitutionally required by the Fourth Amendment.” (Emphasis added.)

The affidavit of the deputy sheriff on which the warrant was issued in the case now before us stated that the affiant had probable cause to believe that defendant had on his premises and in his vehicle certain property, to wit, non-tax-paid whiskey. It described the premises and vehicle to be searched with sufficient particularity, and then contains the following:

“The facts which establish probable cause for the issuance of a search warrant are as follows: A confidential and reliable informant who has given reliable information says that there is non tax paid whiskey at above location at this time.”

No other facts were stated in the affidavit on which the warrant was issued and there is no suggestion in the record that any evidence other than that contained in the affidavit was furnished to the magistrate to support the finding of probable cause at the time the warrant was issued.

When the affidavit is examined in light of the holdings in *Aguilar* and *Spinelli*, I find that even if it be considered minimally sufficient to allow the magistrate to determine that the confidential informant was credible (see *State v. Brown*, 20 N.C. App. 413, 201 S.E. 2d 527), a point as to which I have considerable question, nevertheless it is totally deficient in that it contains none “of the underlying circumstances from which the affiant’s informer concluded that the articles sought were where the informer claimed they were.” *State v. Campbell, supra*. The majority opinion appears to lay stress upon the particularity with which the house and vehicle to be searched are described in the affidavit, but a search warrant to be constitutionally valid under the Fourth Amendment must in any event particularly describe the place to be searched, and one may easily be able to give an exact description of the exterior of a house or automobile without having the slightest information as to what is inside. The majority opinion also emphasizes that the affidavit “states that the contraband is at the described location at the time the affidavit was signed,” and draws the conclusion that “[i]t is obvious from the unequivocal information given by the informant that the accusation was not casual rumor.” The

State v. Watson

conclusion drawn may be obvious to the majority. It is not to me. Quite incidentally, the unequivocal information which the majority here finds "sufficiently substantial to justify a finding of probable cause by the magistrate" turned out to be false. No non-tax-paid whiskey, the only contraband mentioned in the affidavit, was found.

If the majority opinion is correct in finding the search warrant in this case constitutionally valid to authorize a search for non-tax-paid whiskey, then the question is presented whether seizure of tax-paid whiskey not mentioned in the warrant and not inherently contraband was also authorized by the warrant. The problem presented is not without difficulty. See: 68 Am. Jur. 2d, Searches and Seizures, § 112, p. 768, 769. The majority opinion solves the problem by ignoring it.

I find error in the trial court's holding the search warrant valid and in admitting evidence of the tax-paid whiskey obtained by the search, for which I vote to award defendant a new trial.

STATE OF NORTH CAROLINA v. ELDRIDGE WATSON

No. 7414SC504

(Filed 7 August 1974)

**Criminal Law § 85— character evidence — reputation among narcotics users
— specific occurrences — personal opinion — acts of misconduct**

In a prosecution for possession and sale of heroin wherein defendant testified but offered no evidence of his character, the trial court erred in permitting police officers to testify as to defendant's reputation among a small group of narcotics users, to base testimony as to defendant's reputation on specific occurrences, to state a personal opinion as to whether defendant's character was good or bad, and to list specific acts of misconduct for which defendant was not being tried.

ON *certiorari* to review the order of *Bailey, Judge*, entered at the 21 November 1972 Session of DURHAM County Superior Court.

The defendant was charged in two bills of indictment alleging the felonious possession of a controlled substance, heroin, and the sale of controlled substances. Pleas of not guilty were entered to each charge. From a verdict of guilty and the imposi-

State v. Watson

tion of a five year sentence on each count, the defendant gave notice of appeal.

Officer C. R. Thompson testified that he was a public safety officer of the City of Durham. He stated that he went to the premises of the defendant on 8 March 1972, with an informer. They engaged in conversation with the defendant for a couple of minutes, and the informer asked the defendant "What is happening?". Officer Thompson testified that this means in street vernacular, "Do you have any heroin to sell?" Officer Thompson further explained that the answer "Everything is happening" is an affirmative answer and "Nothing is happening" is a negative response. The defendant replied "Everything is lovely". The informer then told the defendant that he wanted to "cop two bags", which meant that he wanted to buy two bags of heroin. The defendant gave the informer two bags, and the informer gave the defendant \$16.00 in return. The informer and the officer then left the scene and turned the substance contained in the bags over to the police. It was subsequently identified as heroin.

The defendant testified that he had been a resident of Durham for thirty-two years and had resided at the same address for the past seventeen years. He denied having seen Officer Thompson on the date in question or at any other time prior to the trial. He denied ever having used, possessed, or sold heroin.

Attorney General Robert Morgan, by Associate Attorney William A. Raney, Jr., for the State.

Loflin, Anderson and Loflin, by Thomas F. Loflin III, for the defendant.

CARSON, Judge.

Following the testimony summarized above, the State presented its case on rebuttal. It first called Lt. T. H. Lassiter of the Durham Police Department. After stating his duties with the police department, which included responsibilities for the vice squad and narcotic law enforcement, Officer Lassiter was asked if he was familiar with the character and reputation of Eldridge Watson in the community in which he resides. He answered,

"[w]ell, since December of last year when I started working with the vice squad, I think one of the first names that I

State v. Watson

heard mentioned in regards to heroin pushers, a person that sells heroin, was Eldridge Watson, alias Ted Watson, and since that time I have talked to a number of informers, a number of addicts, who tell me they have bought heroin from Mr. Watson, and I would say no less than 20 people, different people. I can say from my information from other people that use heroin that at least for the past year or past eleven months he has been involved in the sale of heroin."

The defendant objected to this answer and moved to strike it. The trial court did not rule on the motion but stated that the witness had not yet said what his character and reputation is. Subsequently, the witness was asked "Would you say his character is good or bad?" The witness answered "I would have to say it was bad." The defendant again moved to strike, but his motion was denied.

The next witness called was Captain G. S. Lee of the Durham Police Department. After relating his experience and duties with the police department, which included direction of the vice squad, he was asked if he knew the character and reputation of Eldridge Watson in the community in which he resides. His answer was "His reputation is that of a heroin distributor". The defendant again objected and moved to strike. His motion was again denied. Captain Lee continued to testify as follows:

"[a]nd his character is poor insofar as the known addicted citizens in that neighborhood are concerned. I have had occasion to spend hours watching Mr. Watson or his house or his car, through binoculars at night. I have seen him on numerous occasions drive down on Violet Street to the former residence of Bonnie Lee Daye, in either a pickup truck he drove or his Ford. At the same time an addict would come to the house and Mr. Watson would go in. The addict or small pusher would then leave, and then Mr. Watson would drive back to his house. This has been repeated on many occasions.

I have seen him in the company of numerous heroin addicts and pushers, including the top hierarchy of the Durham structure. I have engaged in conversation with Mr. Watson about this business prior to his ever being caught and asked him to get out of it, and which he did not. My men

State v. Watson

have found heroin in his car and I have searched his house without results.

Captain Lee was then asked about conversation with the defendant concerning the drug traffic. He answered "Yes sir. I caught him coming from his stash on Willard Street one night, and it scared him, and he walked up to the car. There was another heroin addict in his truck waiting, a man that has testified in this court for the state, and I later talked to that man and he told me what transpired." Again, the defendant objected and again it was overruled.

The answers of the law enforcement officers were neither responsive nor admissible. Although the defendant testified concerning his lack of knowledge of the use or sale of narcotics, he did not offer separate evidence of his character. Consequently, he could only be impeached as any other witness. 2 Stansbury's North Carolina Evidence (Brandis Revision), Character, § 108. His general character and reputation in the community where he is well-known was admissible only as to his veracity as a witness. *State v. Norkett*, 269 N.C. 679, 153 S.E. 2d 362 (1967); *State v. Austin*, 4 N.C. App. 481, 167 S.E. 2d 10 (1969). Although the State could rebut defendant's testimony that he had never seen Thompson with evidence that the officer had had earlier dealings with defendant, the answers went entirely too far, and the trial court made no effort to correct these mistakes.

First, his reputation must be established in the community in which he has a well-known or established reputation. *State v. McEachern*, 283 N.C. 57, 194 S.E. 2d 787 (1973); 29 Am. Jur. 2d, Evidence, § 347. It is not sufficient that it be established among a small group of people, such as the twenty narcotics users mentioned. *State v. Smoak*, 213 N.C. 79, 195 S.E. 72 (1938); *State v. Hodgin*, 210 N.C. 371, 186 S.E. 495 (1936). Secondly, it must be general in character and must not be based on specific occurrences. *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972); 2 Stansbury's North Carolina Evidence (Brandis Revision), Character, § 111. Finally, it was improper of the witness to give his personal opinion as to whether or not the character of the defendant was good or bad. *Johnson v. Massengill, supra*. In addition to the erroneous materials introduced on the question of character and reputation, the answers contained other objectionable material. The statements were rank with hearsay evidence. Furthermore, they listed specific acts of

Zimmerman v. Hogg & Allen

misconduct for which the defendant was not being tried. While we recognize that law enforcement officers are most anxious to obtain convictions against those whom they consider to be the chief suppliers of narcotic drugs, the law enforcement officers must be very vigilant not to cause new trials by their overzealous conduct on the witness stand. At the very minimum, the trial court should have stricken the answers of the witnesses and instructed the jury not to consider them. The answers were not only highly improper, they were also highly prejudicial. For these reasons we feel that a new trial must be awarded.

New trial.

Judges PARKER and VAUGHN concur.

SAM ZIMMERMAN v. HOGG & ALLEN, PROFESSIONAL ASSOCIATION,
SUCCESSOR TO GREENE, HOGG & ALLEN, PROFESSIONAL ASSOCIATION,
AND GLENN L. GREENE, JR.

No. 7423SC291

(Filed 7 August 1974)

Attorney and Client § 5; Partnership § 5— misappropriation of funds by attorney — liability of professional association

A professional association of attorneys engaged in the practice of labor law is not liable for one attorney's misappropriation of funds given to such attorney for the purpose of investment in the common stock of a corporation since counseling concerning investments was not a part of the firm's business and the criminal conduct by the attorney who misappropriated the funds was not a part of his anticipated services.

Judge PARKER concurs in result.

Judge VAUGHN dissenting.

APPEAL by plaintiff from *Rousseau, Judge*, 2 November 1973 Session of WILKES County Superior Court.

The plaintiff is an officer and employee of Holly Farms Poultry Industries, Inc. The defendant Hogg & Allen is a professional association located in Miami, Florida, and is the successor to the former professional association of Greene, Hogg & Allen. Both professional associations were formed for the principal

Zimmerman v. Hogg & Allen

purpose of engaging in the practice of law. Greene is the person who formerly was with the professional association.

Holly Farms had engaged Greene, Hogg & Allen to represent it in labor relations and to act as labor counsel for the corporation. The defendant Greene was senior partner and principal stockholder in the association. In March 1971, when the association was engaged in representing the corporation, the plaintiff paid to the defendant Greene the sum of \$36,000.00 with which Greene had agreed to purchase and deliver to plaintiff three thousand shares of the common stock of Kentucky Fried Chicken, Inc., or the equivalent number of shares of Heublein, Inc., with whom Kentucky Fried Chicken, Inc., was going to merge. Greene misappropriated these funds to his own use. In January 1972, the defendant Greene separated from the professional association, and its name was changed to Hogg & Allen, P.A.

The plaintiff brought this action against Glenn L. Greene, Jr., individually, and against Hogg & Allen as successor to Greene, Hogg & Allen. Summary judgment was granted in favor of Hogg & Allen, and the plaintiff gave notice of appeal. There was no factual dispute in the evidence presented by affidavits and by exhibits. At all times complained of, the defendant Greene was the senior partner and major stockholder in the professional association of Greene, Hogg & Allen. This association limited its practice to labor law. It had been retained by the corporation to represent it in its labor relations with its employees. In the course of this representation, the plaintiff became acquainted with the defendant Glenn Greene. The plaintiff stated he had requested that the funds be handled through the association and that he had received correspondence from the defendant Greene on the association's stationery. However, all the letters were signed by Greene individually. The check from the plaintiff to Mr. Greene was made to him individually and not to the firm. Some refunds had been made to the plaintiff and another employee of Holly Farms who had invested with Greene, and these refunds were made on the individual checks of Glenn Greene.

The plaintiff had discussed the nature of the investment with the defendant Greene before furnishing him with the funds. Greene had explained the availability of the stock and also had explained the possibility of the merger between Kentucky Fried Chicken and Heublein. There was some evidence that Greene

Zimmerman v. Hogg & Allen

had discussed with another member of Holly Farms certain personal problems the other member was having and had given him some advice on those matters.

After considering all the evidence by affidavit and exhibit, the trial court rendered summary judgment in favor of Hogg & Allen. From the decision the plaintiff appealed.

McElwee and Hall by W. H. McElwee and T. V. Adams for plaintiff-appellant.

Hudson, Petree, Stockton, Stockton, and Robinson by Ralph M. Stockton, Jr., and James H. Kelly, Jr., for defendant-appellee, Hogg and Allen.

CARSON Judge.

At the outset, we note the fact that Hogg and Allen is a professional association neither enlarges nor diminishes their professional responsibility. Under North Carolina law, professional corporations are liable to the same extent as if they were a partnership. G.S. 55B-9.

The general rule in this jurisdiction is that a partner or officer cannot bind the partnership or corporation beyond the normal scope of his authority. *Moore v. WOOW, Inc.*, 253 N.C. 1, 116 S.E. 2d 186 (1960); *Edgewood Knoll Apartments v. Braswell*, 239 N.C. 560, 80 S.E. 2d 653 (1954). While our courts have not decided a case where a partner in a law firm receives money to invest, and appropriates it to his own use, this problem has arisen in other jurisdictions. In the case of *Rouse v. Pollard*, 130 N.J. Eq. 204, 21 A. 2d 801 (1941), the plaintiff was represented by a partner in the law firm. The plaintiff sold some securities and presented a check made to one of the partners to invest for her. The partner sent her several checks of his which purportedly were interest from the investment. However the plaintiff discovered that the partner had appropriated the funds. The New Jersey court held that the placing of money for the purposes named was not a function of the practice of law, and it was not a part of the practice of the defendants. The partnership, therefore, was not liable. A similar case is *Riley v. Laroucq*, 163 Misc. 423, 297 N.Y.S. 756 (1937), in which a partner accepted \$6,000.00 from the plaintiff for the purpose of investment. Again, it was held that this was not a part of the practice of law, and the remaining partners were not liable

Zimmerman v. Hogg & Allen

for the criminal conduct of the one. In the recent case of *Jackson v. Jackson*, 20 App. 406, 201, S.E. 2d 722 (1974), the plaintiff alleged that his wife and her attorney had conspired to institute criminal proceedings against him maliciously and without cause. He sought to hold the law firm responsible for the conduct of his wife's attorney. This court held that a lawyer who engages in malicious prosecution is not acting in the ordinary course of his firm's business even though counseling concerning the advisability of bringing such a suit was a part of the firm's business. The matter was distinguished by the fact that the partner allegedly was acting maliciously and this took him outside the scope of the firm's business.

The instant case is clearer than that of *Jackson v. Jackson*. Here, counseling concerning investments was not a part of the firm's business, especially since the firm limited its practice to labor law. Furthermore, the criminal conduct on the part of the defendant Greene was not a part of his anticipated services. The conduct of Greene was in violation of the standards of his profession, as well as the criminal laws.

The conduct of Greene was not a part of his professional affairs and consequently summary judgment was properly granted.

No error.

Judge PARKER concurs in result.

Judge VAUGHN dissents.

Judge VAUGHN dissenting:

In my opinion conflicting inferences arise from the evidence before the Court on defendant's motion for summary judgment. Defendant has failed to carry its burden to show (1) the absence of any question of material fact and (2) that plaintiff, as a matter of law, cannot recover on his claim.

Rhodes v. Hogg & Allen; State v. Propst

FRANK E. RHODES v. HOGG & ALLEN, PROFESSIONAL ASSOCIATION,
SUCCESSOR TO GREENE, HOGG & ALLEN, PROFESSIONAL ASSOCI-
ATION, AND GLENN L. GREENE, JR.

No. 7423SC290

(Filed 7 August 1974)

APPEAL by plaintiff from *Rousseau, Judge*, 2 November 1973 Session of WILKES County Superior Court.

McElwee & Hall by T. V. Adams for plaintiff appellant.

Hudson, Petree, Stockton, Stockton and Robinson by James H. Kelly, Jr. for defendant appellees.

CARSON, Judge.

The facts in this case are similar to those reported in the case of *Zimmerman v. Hogg & Allen*, ante 544, the judgment of the trial court is affirmed.

Judge PARKER concurs in result.

Judge VAUGHN dissents.

STATE OF NORTH CAROLINA v. DONALD LEROY PROPST

No. 7425SC416

(Filed 7 August 1974)

1. Criminal Law § 29— mental capacity to plead — sufficiency of evidence

Trial court's determination that defendant had sufficient mental capacity to plead to the bill of indictment was supported by the evidence presented at a pretrial hearing held to determine that question.

2. Evidence § 29; Criminal Law § 80— medical records— exception to hearsay rule

The trial court in a homicide case properly allowed a doctor to read clinical notes into evidence although the person who prepared the notes was not available as a witness since medical records made in the regular course of business are admissible as an exception to the hearsay rule.

State v. Propst

3. Criminal Law § 5— ability to distinguish between right and wrong at time of trial

Defendant was not prejudiced by the admission of medical testimony as to his ability to distinguish between right and wrong at the time of the trial.

APPEAL by defendant from *McLelland, Judge*, 15 October 1973 Session of Superior Court held in BURKE County. Heard in the Court of Appeals on 11 June 1974.

This is a criminal action wherein the defendant, Donald Leroy Propst, was charged in a bill of indictment, proper in form, with the first degree murder of Ralph Henderson Taylor on 21 February 1966.

Upon the call of the case for trial, the trial court, acting upon the suggestion of the district attorney, which was concurred in by counsel for the defendant, conducted a hearing to determine the competency of the defendant to plead to the bill of indictment. After the testimony of three doctors and defendant's attorney, the trial court made findings and conclusions which include the following:

"I conclude from these findings that the defendant is mentally ill, that his illness is now in partial remission, and that he now has sufficient mental capacity to comprehend his position, understand the nature and object of the criminal proceeding against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interpreted in his behalf.

"I further conclude that the defendant has sufficient mental capacity at this time to plead to the bill of indictment and to receive sentence if convicted."

The defendant entered a plea of not guilty and the State offered evidence tending to show that on 21 February 1966 the defendant, Donald Propst, entered the Taylor Hosiery Mill located in Hildebran, N. C., and started "hollering for Ralph Taylor". Charles Polk, one of the employees of the mill, testified that the defendant walked up to him and said, "Where is Ralph, the son of a b—? I come to kill him." A moment later Ralph Taylor entered the knitting machine room and asked the defendant to leave his place of business. After making this request, Taylor turned and started walking away; however, the

State v. Propst

defendant shoved Taylor into a nearby tool room. The defendant then pulled a pistol from his pocket, pointed it at Taylor, and fired twice. Defendant then fled the hosiery mill with his brother Frank who had accompanied him to the mill. Taylor died shortly thereafter from the wounds inflicted by the bullets from the pistol.

Defendant offered evidence tending to establish the following: Frank Propst, defendant's brother, testified that on the day in question the defendant had been drinking heavily and had also taken a small "snap-type box" of aspirin. Defendant and his brother drove to the Taylor Hosiery Mill and upon arrival at the mill Frank Propst pleaded unsuccessfully with his brother not to go inside. Once inside the mill, defendant confronted Ralph Taylor; and Frank Propst testified as to the events which transpired immediately thereafter:

"As they came back up the aisle, Ralph went into the tool room and by that time, Donald went by the tool room door and he turned and looked into the room at Ralph and Ralph came out of the door with a hammer in his hand and about that instance I seen the hammer and I seen the gun. This was the first time I had seen the gun that day. Ralph hit Donald with the hammer on the right hand and the gun fired. The gun fired immediately when the hammer hit. The hammer hit Donald's right hand. I saw the hand after the hammer hit it. There was a black spot where the hammer had hit. I heard another shot fired. After both shots were fired, Donald said, 'Let's go, Frank.' I went and looked in the door and Ralph was lying there. I said, 'Oh, my God, Ralph,' or something to that effect. We walked out the front door and left in the truck."

Defendant also offered the testimony of Dr. Walter A. Sikes, former Superintendent of the Dorothea Dix Hospital, who testified that in his opinion the defendant was unable to know the difference between right and wrong on 21 February 1966 and would not have known at that time that shooting a man was a wrongful act.

From a verdict of guilty of murder in the second degree and a judgment imposed thereon of not less than twenty-five (25) nor more than thirty (30) years, the defendant appealed.

State v. Propst

Attorney General Robert Morgan by Assistant Attorney General Thomas B. Wood for the State.

Simpson, Martin & Baker by Dan R. Simpson and Samuel E. Aycock for defendant appellant.

HEDRICK, Judge.

Defendant's first two assignments of error relate to the pre-trial competency hearing held by Judge McLelland. Defendant contends that the trial court erred in the following respects: (1) by admitting incompetent evidence in the form of testimony pertaining to letters allegedly written by defendant when these letters had not been identified as being in the handwriting of defendant; and (2) by "requiring the defendant to stand trial on the charge of murder in the first degree on the basis of the testimony when the only medical testimony presented was that the defendant was incompetent to stand trial." These assignments of error are without merit for the reasons stated below.

Chief Justice Bobbitt in the recent case of *State v. Potter*, 285 N.C. 238, 247, 204 S.E. 2d 649, 655 (1974), reiterated the following rule, which governs the determination of whether a defendant has sufficient mental capacity to plead to the indictment and to conduct a rational defense:

"In determining a defendant's capacity to stand trial, the test is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed." [citations omitted]

[1] In the instant case, Judge McLelland determined that the circumstances called to his attention by the district attorney were sufficient to merit a formal inquiry to determine whether, when tested by the rule stated above, the defendant had sufficient mental capacity to plead to the indictment and to conduct a rational defense. At this pre-trial hearing the State offered the testimony of Dr. Robert Rollins who testified:

"I think Mr. Propst comprehends his position as it relates to his being indicted. I have an opinion that he has the ability to understand the nature and object of the proceeding against him, namely a charge of first degree

State v. Propst

murder. In my opinion Mr. Propst can cooperate with his attorneys to conduct his defense. He is capable of conducting his defense in a rational manner, and I believe that he can cooperate with his counsel."

A careful review of the evidence presented at the pre-trial hearing discloses that the findings made by the trial judge are supported by competent evidence and as such are binding upon us on the appeal. *Gaster v. Goodwin*, 263 N.C. 441, 139 S.E. 2d 716 (1965). Moreover, these findings are conclusive "even though there is evidence contra, or even though some incompetent evidence may also have been admitted." 1 Strong, N. C. Index 2d, Appeal and Error, § 57, pp. 223-4.

[2] Next, defendant maintains that the trial court committed error by allowing clinical notes to be read into evidence when the person preparing the notes was not available as a witness. Defendant contends that such evidence is hearsay and should be excluded because the defendant was denied the opportunity to cross-examine the maker of the notes and to test his memory, veracity, etc.

In *Sims v. Insurance Co.*, 257 N.C. 32, 35, 125 S.E. 2d 326, 328, 329 (1962), Justice Clifton Moore made the following germane statement:

"Hospital records, when offered as primary evidence, are hearsay. However, we think they come within one of the well recognized exceptions to the hearsay rule—entries made in the regular course of business. Modern business and professional activities have become so complex, involving so many persons, each performing a different function, that an accurate daily record of each transaction is required in order to prevent utter confusion. An inaccurate and false record would be worse than no record at all. Ordinarily, therefore, records made in the usual course of business, made contemporaneously with the occurrences, acts, and events recorded by one authorized to make them and before litigation has arisen, are admitted upon proper identification and authentication. *Builders Supply Co. v. Dixon*, 246 N.C. 136, 97 S.E. 2d 767; *Breneman Co. v. Cunningham*, 207 N.C. 77, 175 S.E. 829; *Insurance Co. v. R. R.*, 138 N.C. 42, 50 S.E. 452."

* * *

"In instances where hospital records are legally admissible in evidence, proper foundation must, of course,

State v. Propst

be laid for their introduction. The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition, or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam*. The court should exclude from jury consideration matters in the record which are immaterial and irrelevant to the inquiry, and entries which amount to hearsay on hearsay."

A careful review of the testimony of Dr. Walter Sikes, the witness who read the clinical notes into evidence, reveals complete compliance with the requirements set forth in *Sims, supra*. Therefore, the trial court properly determined the clinical notes to fall within one of the exceptions to the hearsay rule and as such to be admissible into evidence.

[3] Next, the defendant maintains that the court committed prejudicial error in allowing into evidence medical testimony regarding the defendant's ability to discern between right and wrong at the time of the trial. Assuming, *arguendo*, that it was error for this evidence to be admitted, we fail to see how this could possibly constitute prejudicial error and thus this assignment of error is overruled.

Finally, defendant brings forward and argues several other assignments of error which we have carefully examined and find to be nonmeritorious.

The defendant was afforded a fair trial free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

State v. Hicks

STATE OF NORTH CAROLINA v. MOLLIE HICKS

No. 745SC334

(Filed 7 August 1974)

Criminal Law § 11; Homicide § 21— accessory after fact to involuntary manslaughter — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of accessory after the fact of involuntary manslaughter where it tended to show that the principal felon told defendant that he had shot decedent while "playing" with a shotgun in defendant's apartment, that defendant successfully encouraged the principal and others who were in the apartment at the time of the shooting to tell investigating officers that deceased was shot by someone from outside when he opened the door, that defendant published such false story to others, and that when questioned by officers defendant concealed her knowledge that the principal had killed decedent and told officers she had heard a rumor that a white man had been seen running from the apartment.

ON *certiorari* to review trial before *Rouse, Judge*, at the 18 June 1973 Session of Superior Court held in NEW HANOVER County.

Defendant was indicted for being an accessory after the fact to involuntary manslaughter.

Evidence for the State tended to show the following. Early in the evening on 13 March 1971, Clifton Eugene Wright was fatally shot by Donald Jerome Nixon while Nixon was "playing" with a shotgun in defendant's apartment. Nixon had been staying in the apartment with defendant, her daughter and another youth. Nixon stated he did not know the gun was loaded but admitted that he intentionally pointed it at deceased and that he intentionally pulled the trigger.

Defendant's daughter, Leatrice Hicks, was at the apartment when the incident occurred and immediately telephoned defendant who was at a meeting. Shortly after the police arrived, defendant returned home and was met by Nixon outside the apartment. Nixon described the ensuing conversation as follows:

"She asked me what happened. I told her the truth. I told her that we was in there playing and I shot him. She asked me what did we tell the police. I told her nothing. And I told her what the three of us agreed on. I told her I was

State v. Hicks

going to tell the truth. She said, 'No, don't do that. I will do the talking in the house.' I told her that we was playing with the shotgun and I shot him. I then told her the story that we were going to tell the police. I told her that we had agreed to tell the police that we heard a knock from the door and that he (Clifton Eugene Wright) was shot answering the door. Told her that McClain, Leatrice and I had agreed upon the story. She said, 'Okay.'"

While police were still questioning witnesses at defendant's apartment, Nixon at one point told defendant that he was "going to tell the truth," and defendant replied, "No, don't do that." Nixon ultimately conveyed "the false story" to the police. Leatrice Hicks and Jerome McClain gave the police substantially similar false accounts of the killing. Defendant told the police "she had no knowledge who committed this offense. . . . At that time she only said that a man had—that Wright had been shot at the apartment by someone from outside. . . ."

Later on the evening of 13 March, defendant met with Nixon and McClain and suggested that the trio go to Laurinburg the next day to meet with Benjamin Chavis and his lawyer for "some legal advice." Nixon again stated he was going to tell the truth, and defendant urged him to "[w]ait until we get the legal advice we get from the lawyer. . . ."

Defendant arranged for the group to change vehicles during the excursion to Laurinburg. She expressed the fear that they were "being followed."

Upon arriving in Laurinburg, defendant met alone with Benjamin Chavis. Chavis then talked with Nixon and McClain. "Chavis said, 'What's happening. I already know what you'all told the police.' He said, 'who wasted the brother?' [Nixon] told him that we were in there playing and [he] shot [Wright]. And then he asked what did I tell the police. I told him." Chavis inquired if either Nixon or McClain intended to tell anyone the truth and pointed out the two might "get railroaded" if they did tell the truth. Chavis explained that he would talk to an attorney and then "let" Nixon and McClain "run the story down, what [they] told the police. . . ." He said, "[I]f he [attorney] go for it, we will leave it like that."

Defendant, Chavis, Nixon, McClain and Leatrice Hicks also conferred with a lawyer in a motel room in Laurinburg. De-

State v. Hicks

fendant and Chavis talked privately with the lawyer before the other three were called in. McClain described the discussion.

"We went on in the room. Like at that time I didn't know what to say. Don didn't say anything and I didn't say anything. As the result of what Ferguson said, we didn't know whether we should tell him what exactly happened, so he rephrased the question that he asked us. He asked us what did we tell the police. And Don went on and told him the false story that we gave the police. He told him that—Don told Ferguson that me and him was in the kitchen arguing about a soda and a knock came to the door and Wright answered it and it was a shot."

After returning to Wilmington, defendant warned Nixon and McClain, "Don't drink too much and start talking. . . ."

On the night of the killing, defendant told a close friend, Willie Belon, that "a white guy knocked on the door and Wright answered the door and that's when he got shot."

Two weeks after the shooting, Nixon and McClain determined to go to the police and tell the truth. They located Leatrice Hicks who persuaded them not to talk with the police until she contacted her mother, the defendant. Unable to reach defendant, Leatrice Hicks talked with Chavis, telling him that she, Nixon and McClain were going to the police. Chavis spoke to Nixon:

"Chavis said, 'Keep your head. That's what the pigs want you to do, break.' He said that we'd probably get railroaded for waiting so long. Said we wouldn't get a fair trial. And he would be down in a few days and talk about it."

Chavis also spoke with McClain:

"[H]e asked me was the pigs riding my back; was they giving me a hassle. I told him, 'Yes, every day.' He told me they wanted me to break. If I break I was going to get railroaded. He said try to keep a cool head and he would be down there in a couple of days and don't do nothing until he got there. Then he said something about if they should charge, pick us up and charge any of us with it to get up touch with some lawyers. . . ."

James M. Underhill, a special agent with the Federal Bureau of Investigation, testified that in April 1971, the Justice

State v. Hicks

Department instructed him "to make an inquiry as to a possible civil rights violation in which involved the death of Clifton Eugene Wright." During the course of his investigation, Underhill interviewed defendant who told him "that she had gotten the information from her daughter and the two other young men [Nixon and McClain] that Wright had opened the door and had been shot by an unknown party. . . ." Defendant said "she had heard of a rumor that a white man had been seen running from the house."

In December of 1971, Nixon told the police he had shot Wright. He was then charged with murder and pled guilty to involuntary manslaughter.

Defendant offered no evidence. The jury found defendant guilty as charged. Defendant was sentenced to a prison term of 8 to 12 months, suspended and placed on probation for two years.

Attorney General Robert Morgan by R. Bruce White, Jr., Deputy Attorney General, and Alfred N. Salley, Assistant Attorney General, for the State.

John H. Harmon for defendant appellant.

VAUGHN, Judge.

Defendant contends that his motion for nonsuit should have been allowed. To take the case to the jury, the State was required to offer evidence tending to show:

"(1) that the principal felon had actually committed the felony. . . ; (2) that the accused knew that such felony had been committed by the principal felon; and (3) that the accused received, relieved, comforted, or assisted the principal felon in some way in order to help him escape, or to hinder his arrest, trial, or punishment." *State v. Williams*, 229 N.C. 348, 49 S.E. 2d 617.

Merely concealing knowledge regarding the commission of a crime or falsifying such knowledge does not cause a person to become an accessory after the fact.

"Where, however, the concealment of knowledge of the fact that a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account

State v. Hicks

of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact." *State v. Potter*, 221 N.C. 153, 19 S.E. 2d 257.

We hold that the evidence was sufficient to take the case to the jury. Defendant concedes that the State met its burden regarding proof that the felony, namely involuntary manslaughter, was committed. The felon, Nixon, told defendant that he had shot Wright while playing with the gun. There is evidence that defendant deliberately aided, comforted and encouraged Nixon in his effort to avoid detection as the killer.

On several occasions defendant successfully discouraged the felon from admitting his guilt, an admission which would have, of course, resulted in his arrest. Defendant successfully encouraged the felon to lie to those charged with the investigation of the crime so as to divert suspicion from himself and avoid detection. When questioned by investigating officers defendant concealed her knowledge that Nixon had shot and killed Wright. To divert suspicion from the real killer, she attempted to lay down a false trail for the officers to follow by telling Officer Fredlaw that someone had shot Wright from outside the apartment. She continued to help spread and extend the false trail away from the felon by publishing the same concocted story to others. She told Willie Belon, ". . . a white guy knocked on the door and Wright answered the door and that's when he got shot." As a result of the false story she had encouraged and helped spread, the Federal Bureau of Investigation made inquiry about the possibility that a civil rights violation might be involved in the death of Wright. Defendant, in April 1971, repeated the false version to the investigating federal agent, adding that she heard a rumor that "a white man had been seen running from the house. That she had been told that by Mr. Chavis. . . ."

It is manifest that defendant was not acting out of fear and equally clear that defendant's actions were calculated to and did aid the guilty felon to avoid detection and arrest.

Defendant argues that there is no evidence that she had knowledge that the crime had been committed. We hold that the evidence was sufficient to permit the jury to find that defendant knew that the unlawful killing had taken place and that Nixon was the slayer.

State v. Burton

Defendant's argument that the court failed to explain the law arising on one of her "contentions" is without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. GRADY BURTON, JR.

No. 7426SC316

(Filed 7 August 1974)

1. Criminal Law § 75— handing hat to defendant — statement by defendant — absence of Miranda warnings

Testimony that a police officer handed defendant a hat found at the scene of a robbery and defendant said "Thank you" and placed the hat in his lap was admissible although defendant had not been given the Miranda warnings since defendant's statement was not the result of interrogation and was voluntary.

2. Criminal Law § 66— picking out wrong man in lineup — exclusion of testimony

The trial court did not err in refusing to permit a detective to testify that the victim had picked out the wrong man in a lineup where the victim testified at the trial that he was still unable to identify the defendant.

3. Criminal Law § 112— refusal to instruct on circumstantial evidence

The trial court in a robbery case did not err in failing to instruct on circumstantial evidence as requested by defendant in writing where the evidence in the case was direct.

APPEAL by defendant from *Grist, Judge*, 26 November 1973 Session of MECKLENBURG County Superior Court.

The defendant was charged in a bill of indictment with the felony of attempted armed robbery. A plea of not guilty was entered. From a verdict of guilty as charged and an active sentence of eighteen to twenty-five years imposed thereon, the defendant gave notice of appeal.

The State's evidence showed that the victim of the crime, Edwin Wossick, was seventy-four years old and lived in Edwin Towers, an apartment facility for the elderly located in down-

State v. Burton

town Charlotte. On 9 March 1973, Wossick had gone to Belks Department Store a few blocks away from his apartment and purchased a shirt. He was returning to his apartment at about 8:15 p.m. when he heard someone behind him say "Sir," and he turned around. A co-defendant, Larry McFarland, had a pistol pointed at Wossick when he turned around. Wossick started to shout and McFarland shot him in the leg, stating that he would shoot higher if Wossick didn't be quiet. Wossick continued to shout, and the co-defendant McFarland shot him twice more, the second time higher in the leg and the third time in the groin. McFarland threw Wossick to the ground and the defendant crossed the street and joined them. The defendant searched Wossick and stated to McFarland, "I don't find anything here." Both defendants then ran away.

Paul Morgan testified that he worked for the Charlotte Fire Department and was at the station near the scene of the crime. He saw the two defendants walking down the street behind the victim and later heard the shots. He ran outside and saw the defendant pulling Wossick to the ground. He stated that the man who ran up and searched Wossick had on a white hat.

Officer J. C. Robbins testified that he received the call that the robbery had taken place and proceeded immediately to the scene of the crime. A short distance away, he and his partner noticed a suspect lying underneath a car parked in the street. They ordered him to come out and placed him under arrest. The defendant Burton was the person who was found under the car. His hair was in small braids or pigtails which covered his whole head. This took place approximately one block from where Edwin Towers were located.

The other perpetrator of the crime, Larry McFarland, testified for the State. He stated that he had known the defendant Burton for ten or twelve years. He testified that on the date in question he had been drinking liquor with some friends. He met the defendant Burton, and they had some conversation about going and making some money. Burton said he had a pistol at home and would go get it. They proceeded to drive around until they saw Wossick walking down the street. At that time Burton gave the pistol to McFarland. McFarland panicked after the shots were fired, hollered to Burton, and ran. He testified that he did remember seeing Burton beside the victim. He further testified that Burton was wearing a knit cap with some white on it, and that Burton's hair had braids in it. McFarland also

State v. Burton

tried to hide underneath a parked car but was discovered and apprehended by the police.

Officer H. L. Kuchenbrod testified that he went to the scene of the crime and discovered a white hat on the walkway where the attempted robbery took place. He testified that he took it to the police station. The defendant Burton was in custody at the station at that time. Officer Kuchenbrod walked over to Burton and handed him the hat. Burton said "Thank you" and placed it in his lap.

Detective D. W. Kirkpatrick testified that he interrogated the defendant on the following day. Before asking him any questions, he warned him of his constitutional rights and had him execute a waiver, which was introduced into evidence. The defendant admitted to Detective Kirkpatrick that the hat belonged to him, but said he did not remember where he had lost it.

Following objection by the defendant, the trial court conducted a voir dire examination outside the presence of the jury. Based upon the evidence presented, the trial court concluded that the defendant was warned of his constitutional rights at the scene of the arrest and again the following morning at the police station. The court further held that the statements were freely and voluntarily made by the defendant, and they were admitted into evidence.

Attorney General Robert Morgan, by Assistant Attorney General Rafford E. Jones for the State.

Martin, Howerton and Williams, by Neil C. Williams for the defendant.

CARSON, Judge.

[1] The defendant first contends that the trial court committed error by allowing into evidence the statements made by the defendant on the night of the arrest and the following day concerning ownership of the hat. The defendant maintains that Officer Kuchenbrod tricked him by handing him the hat and the fact that he said "Thank you" and placed it in his lap was protected by the *Miranda* decision and should not have been admitted into evidence. We do not believe that the holding of the *Miranda* case should be extended to extemporaneous statements of this nature. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). The defendant was not

State v. Burton

being interrogated at the time, and his statement was voluntary. It was not made in response to a question put to him by a law enforcement officer. Having been voluntarily given by the defendant, it was admissible for the jury's consideration. *Miranda v. Arizona*, *supra*; *State v. Jackson*, 280 N.C. 563, 187 S.E. 2d 27 (1972).

The defendant admitted the following morning to Detective Kirkpatrick that the hat was his. The trial judge conducted a lengthy voir dire and made findings of fact and conclusions of law based thereon. His findings were supported by competent evidence and will not be disturbed on appeal. *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971); *State v. Turnbull*, 16 N.C. App. 542, 192 S.E. 2d 689 (1972).

[2] The defendant next contends that the court committed error in not allowing Detective Kirkpatrick to testify that the victim Wossick picked out the wrong man in the lineup. Detective Kirkpatrick had previously said that the victim was unable to identify the defendant at the lineup. If the victim had been able to identify the defendant in court, his identifying someone else at the lineup would be admissible as a prior inconsistency. *State v. Penley*, 277 N.C. 704, 178 S.E. 2d 490 (1971); *State v. Jenkins*, 8 N.C. App. 532, 174 S.E. 2d 690 (1970); Stansbury's N. C. Evidence (Brandis Revision), Witnesses, § 46. However, at the trial the victim stated that he was still unable to identify the defendant. For that reason the court acted properly in sustaining the objection to that question.

[3] The defendant contends that the court committed error in not instructing the jury on circumstantial evidence. A written request for such instruction was submitted to the court before its charge to the jury. Counsel for defendant admits that no case has been found in which the defendant requested in writing a special instruction on circumstantial evidence prior to the charge and the court failed to give such instructions. The evidence in this case was direct, and we do not feel that the court committed error in refusing to charge on circumstantial evidence. The defendant contends that the court committed error in not granting his motion for nonsuit and, furthermore, that the court committed error in not giving equal stress to the contentions of the parties. We do not feel that either of these contentions has merit. We have examined the record and the

In re Beatty

charge to the jury, and we hold that the defendant received a fair trial, free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

IN THE MATTER OF: WILLIE BEATTY, JR. S. S. No. 238-48-6459
LONGSHOREMAN-CLAIMANT, ET AL AND WILMINGTON SHIPPING COMPANY,
POST OFFICE BOX 1809, WILMINGTON, NORTH CAROLINA 28401 ET AL
AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RALEIGH,
NORTH CAROLINA

No. 745SC282

(Filed 7 August 1974)

**Master and Servant § 108— unemployment compensation — longshoremen
— guaranteed annual income plan — unavailability for work**

The Employment Security Commission did not err in determining that longshoremen who applied for unemployment benefits were not "available for work" within the meaning of G.S. 96-13(3) by reason of a collective bargaining agreement establishing a guaranteed annual income fund to provide supplemental benefits for union members unable to obtain employment and requiring the longshoremen to be at the union hiring hall during certain hours each morning in order to receive such benefits.

APPEAL by claimant from *Peel, Judge*, 14 January 1974 Session of NEW HANOVER County Superior Court upholding Employment Security Commission Decision Nos. 4596 and 4597.

The 126 claimants in this matter are longshoremen employed at Wilmington, Southport, and Morehead City. They are employed pursuant to a collective bargaining agreement negotiated between the South Atlantic Employers Negotiating Committee, an employers group representing the major ports in the South Atlantic area, and the International Longshoreman's Association, AFL-CIO. The collective bargaining agreement provided for the establishment of a guaranteed annual income fund (GAI) to provide supplemental benefits for those employees who are union members and seek employment but are unable to obtain it. The GAI fund is exempt from taxation pursuant to Section 501(c)(17) of the Internal Revenue Code. It provides benefits for employees who have worked a stated number of

In re Beatty

hours the previous year. As a prerequisite to receiving benefits under the fund, each longshoreman is required to be willing and available for work.

To be eligible for the GAI benefits, the longshoremen must report to the union hiring hall each week day between the hours of 6:00 a.m. and 7:30 a.m. He is issued a badge which he presents upon arrival, and this practice is called "badging-in." If work is not available, he may badge-out in the same fashion between 8:15 a.m. and 9:15 a.m. This badging-in and badging-out must be accomplished even if there are no ships in the harbor to be loaded or unloaded. After badging-out, the longshoreman is available for part-time employment. However, if he accepts a full time position he loses all benefits under the GAI plan.

The claimants applied to the Employment Security Commission seeking unemployment benefits because of the lack of suitable longshoreman work available for them. Appropriate hearings were conducted by the Employment Security Commission. No exceptions were taken to any of the findings of fact of the Commission. The Commission determined that the most suitable alternate employment available for the claimants was in the construction business in the appropriate areas but that the badging-in and badging-out requirement effectively took the claimants out of the job market. Construction employers in the areas prefer permanent workers, but hire temporary help beginning not later than 8:00 a.m.

Holding that the badging-in and out process of the GAI effectively took the longshoremen out of the labor market, the Commission denied benefits. The claimants appealed to the Superior Court which upheld the ruling of the Employment Security Commission.

Andrew A. Canoutas and Julius Miller for claimants-appellants.

H. D. Harrison, Jr., for the Employment Security Commission, appellee.

CARSON, Judge.

Benefits were denied the claimants pursuant to the provisions of G.S. 96-13(3). It provides:

Section 96-13. Benefit eligibility conditions.—An unemployed individual shall be eligible to receive benefits with

In re Beatty

respect to any week only if the Commission finds that—
(3) He is able to work, and is available for work: Provided that no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work.

The question before us is whether the claimants are able to work and are available for work. Our Supreme Court in the case of *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968), at pages 633-634 describes these phrases as follows:

The term “able to work,” “available for work” and “suitable employment” are not precise terms capable of application with mathematical precision. They are somewhat akin to the terms “reasonable man” and “due care,” which continue to defy the best effort of both the lexicographer and the professor of torts to define them satisfactorily and yet are applied with considerable success each day by juries through the application of common sense and experience. A large measure of administrative discretion must be granted to the Employment Security Commission in the application of these terms in the statute to specific cases.

The Employment Security Commission, applying its discretion, found that the GAI plan effectively removed the longshoremen from the labor market. We do not feel that it abused its discretion in so ruling. While the claimants need not be available at all hours to be “available,” the GAI plan requires their presence every week day morning between the indicated hours. The finding by the Commission that the temporary construction employment must commence at 8:00 a.m. was not the subject of an exception, and is thus binding on us on appeal. *Nationwide Homes v. Trust Co.*, 267 N.C. 528, 148 S.E. 2d 693 (1966); *Thompson v. Hayes*, 17 N.C. App. 216, 193 S.E. 2d 488 (1972). By having to be at the longshoreman’s hiring hall at these hours, the claimants have effectively, voluntarily removed themselves from the labor market and are not entitled to unemployment benefits.

The negotiated agreement between the longshoremen and the South Atlantic Employers Negotiating Committee is a commendable effort to provide security and income for the longshoremen. While we can appreciate the effort of the longshoremen to protect those for whom work is not available, it is

State v. Dark

apparent that this plan is not compatible with Chapter 96. If the public policy of this State should be changed to provide some type of unemployment compensation, this matter must be addressed to the General Assembly.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. LAWRENCE TALTON DARK, III

No. 7324SC417

(Filed 7 August 1974)

1. Arrest and Bail § 4— city police officer — arrest outside city limits — validity

Since a city police officer has all the powers invested in law enforcement officers by statute or common law within one mile of the corporate limits of the city, defendant's arrest by an officer of the Blowing Rock Police Department outside the city limits was not illegal where there was no evidence and defendant did not contend that the arrest was made more than one mile beyond the corporate limits. G.S. 160A-286.

2. Arrest and Bail § 3— driving under the influence — warrantless arrest — validity

Although defendant's arrest for operating a vehicle while under the influence of intoxicating liquor was made without a warrant, it was a misdemeanor which, when the arrest was actually made, the officer had reasonable ground to believe had been committed in his presence, since the officer observed defendant operate his vehicle for a distance of ten feet before stopping him and then smelled alcohol on defendant's breath as the officer approached him.

3. Arrest and Bail § 3— stopping vehicle — probable cause for arrest

Though the arresting officer had no probable cause to believe that defendant had committed any offense when he stopped defendant's truck, the officer did have authority to stop the vehicle, and the existence of probable cause at the time the truck was stopped was not essential to validity of defendant's subsequent arrest. G.S. 20-183(a).

4. Arrest and Bail § 3— warrantless arrest — time of making

Though an officer stopped defendant's vehicle, approached it with his pistol drawn, instructed defendant and his companion to get out, ascertained their identity, and returned his pistol to its holster, defendant was not placed under arrest until the officer told defendant he was under arrest for driving under the influence, and the arrest at that time was valid.

State v. Dark

5. Arrest and Bail § 7; Constitutional Law § 32— right of defendant to communicate with friends and counsel

Where the officer who administered a breathalyzer test to defendant advised him of his right to have a lawyer and a witness present to observe the test and where both the arresting officer and the magistrate advised defendant of his right to make a telephone call, defendant's rights were not violated following his arrest by denial of opportunity to contact family or friends.

6. Criminal Law § 99— remark by trial judge prior to calling of jury — no expression of opinion

Where the trial judge, just prior to the calling of defendant's case, dismissed a felony charge against another defendant and in so doing made an ill-advised comment which was heard by prospective jurors in defendant's case, there was no violation of G.S. 1-180 since that statute relates only to expressions of opinion during the trial of a case, and the trial of a case begins within the purview of the statute when the prospective jurors are called to be examined touching their fitness to serve on the trial jury.

7. Criminal Law § 99— remarks of trial judge in chambers — no expression of opinion

Defendant failed to show prejudice by remarks made by the trial judge in chambers in a private conversation with defendant's father concerning the judge's policy of giving an active sentence to any defendant appearing before him on a charge of driving under the influence if the jury returned a verdict of guilty.

8. Automobiles § 126— breathalyzer test results — admissibility

Results of a breathalyzer test administered to defendant were properly admitted in a prosecution for driving under the influence where the officer who administered the test testified that he was a licensed breathalyzer operator at the time the test was given and that the test was administered in accordance with the rules and regulations of the State Board of Health.

9. Criminal Law § 161— assignments of error — sufficiency

An assignment of error must show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself, and a mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient.

APPEAL by defendant from *Falls, Judge*, 15 January 1973
Session of Superior Court held in WATAUGA County.

Criminal prosecution for operating a motor vehicle on a public highway while under the influence of intoxicating liquor. At approximately 2:20 a.m. on 7 March 1972, Officer Robert Collins of the Blowing Rock Police Department was driving his police car south on the Blue Ridge Parkway at a point just outside of the Blowing Rock Town limits. At that time Collins

State v. Dark

was on the alert for suspects in a previously reported breaking and entering case. As he approached the point where Ahoe Road intersects into the Parkway, he saw a Chevrolet pickup truck stopping at the stop sign on Ahoe Road. When Collins turned left off of the Parkway onto Ahoe Road, the pickup truck started to drive off. Collins shined his patrol car's spotlight at the driver, who was the defendant, and the truck stopped. Drawing his gun, Officer Collins approached the truck and ordered defendant and a passenger in the truck to get out and put their hands up against the police car, which they did. Smelling alcohol on defendant's breath, Collins arrested him for driving under the influence of intoxicating liquor. Defendant was taken to the county jail where he was given a breathalyzer test which showed that he had .14 percent of alcohol in his blood. Defendant testified that he had consumed six 12-ounce mugs of beer between 9:00 p.m. and midnight but had drunk nothing thereafter and was not under the influence at the time of his arrest at 2:20 that morning.

Defendant was found guilty as charged, and judgment was entered on the verdict sentencing defendant to prison for a term of six months, suspended upon condition that he surrender his driver's license, not operate a motor vehicle upon the public highways of North Carolina for twelve months, and pay a fine of \$150.00. From this judgment defendant appealed.

Attorney General Robert Morgan by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorneys General Charles M. Hensey and Guy A. Hamlin for the State.

Phil S. Edwards and Stacy C. Eggers for defendant appellant.

PARKER, Judge.

By his first assignment of error defendant contends that he was deprived of certain basic constitutional rights by the manner of his arrest and by actions of the officers in holding him at the county jail until the following morning. Specifically, he contends, first, that his arrest was illegal in that it was made by a municipal police officer outside the city limits without a warrant and without probable cause, and, second, that following the arrest he was denied the right to contact counsel and friends. The record does not support these contentions.

State v. Dark

[1] The arrest was made by an officer of the Blowing Rock Police Department. As such he had "all the powers invested in law-enforcement officers by statute or common law within one mile of the corporate limits of the city." G.S. 160A-286. Although the record here does not show the exact distance beyond the city limits the arrest occurred, defendant's counsel stated in a written motion to dismiss filed in the district court prior to trial in that court that the arrest took place "just outside of the corporate limits of the town of Blowing Rock," and the district judge, in the order denying the motion, found as a fact that it occurred "near, but outside, the city limits." Defendant has never contended either in the district or superior courts or in this Court on appeal that the arrest was made more than one mile beyond the corporate limits.

[2] Although the arrest was made without a warrant, it was for a misdemeanor which, when the arrest was actually made, the officer had reasonable ground to believe had been committed in his presence. It was, therefore, valid under G.S. 15-41(1). The record does not support defendant's contention that the officer did not see him driving but saw him only after his truck had come to a complete stop at the intersection of Ahoe Road and the Blue Ridge Parkway. The officer testified that he saw defendant "operate his vehicle for a distance of about ten feet," and defendant's testimony that because of the terrain it would have been impossible for the officer to have seen him driving, merely presented a question of fact to be resolved by the jury.

[3] It may be granted that when Officer Collins first stopped and approached the truck he had no probable cause to believe that defendant had committed any offense. Nevertheless, he had authority to stop the truck. G.S. 20-183(a) expressly provides that law enforcement officers within their respective jurisdictions "shall have the power to stop any motor vehicle upon the highways of the State for the purpose of determining whether the same is being operated in violation of any of the provisions of this article." (Article 3 of Chapter 20 of the General Statutes, being the Motor Vehicle Act of 1937 as amended.) Once the officer stopped the defendant and observed his condition, he then had reasonable ground to believe that immediately prior thereto defendant had committed in his presence the misdemeanor of driving his vehicle on a public highway while under the influence of intoxicating liquor. The existence of probable

State v. Dark

cause at the time the truck was stopped was not essential to validity of the subsequent arrest. *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9; *State v. White*, 18 N.C. App. 31, 195 S.E. 2d 576.

[4] Nor do we agree that the arrest actually occurred earlier when the officer first stopped and approached the truck with drawn gun. Mere approach by an officer with drawn pistol upon persons otherwise properly stopped for questioning is not in all circumstances an arrest, *State v. Goudy*, 52 Haw. 497, 479 P. 2d 800. Here, Officer Collins was alone late at night in a remote section and had no way of knowing who or what he would encounter in the truck. With all too tragic frequency law enforcement officers have been killed or wounded in the line of duty, and it would be unreasonable to require that they take unnecessary risks while performing their duties. We note that Officer Collins returned his pistol to its holster as soon as he ascertained the identity of defendant and his passenger, and there is no suggestion that he exercised any excessive force or acted in an oppressive manner at any time thereafter. We hold that the arrest occurred when Officer Collins told defendant he was under arrest for driving under the influence and that the arrest at that time was valid.

[5] The record also does not support defendant's contention that his rights were violated following his arrest by denial of opportunity to contact family or friends. The officer who administered the breathalyzer test testified that he advised defendant of his right to have a lawyer and a witness present to observe the test, and as a matter of fact defendant did have his college roommate, who had been a passenger in the truck at the time defendant was arrested, present at the time the breathalyzer test and other tests of sobriety were given. The district judge in his order denying defendant's motion to dismiss found as a fact after an evidentiary hearing that both the arresting officer and the magistrate advised defendant of his right to make a telephone call. Although defendant testified at the trial in the superior court that he did not recall the officers asking him if he wanted to make a phone call, he also testified that he did not ask to make one and that his roommate wanted him to call home, but he did not want to wake his father at that time of morning. The record here simply fails to support defendant's attempt to bring his case within the ruling in *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462, which is clearly distinguishable on its facts.

State v. Dark

[6] Defendant contends error was committed and he was denied a fair trial in the superior court because the presiding judge, just prior to the calling of defendant's case, dismissed a felony charge against another defendant and in so doing explained to the jurors that, while the case was close, he felt they would not convict and "that as sensible people he did not feel like wasting their time and the court's time by submitting a case to the jury which he did not feel would result in conviction." Defendant contends that this statement was made in the presence of the jury panel from which his jurors were selected and that it amounted to an expression of opinion by the judge in violation of G.S. 1-180. Although such a statement from the judge was certainly ill-advised, it did not constitute a violation of G.S. 1-180. That statute relates only to expressions of opinion during the trial of a case, *State v. Lippard*, 223 N.C. 167, 25 S.E. 2d 594, and "[t]he trial of a case begins within the purview of the statute when the prospective jurors are called to be examined touching their fitness to serve on the trial jury." *State v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173. Here, the statement complained of was made before examination of the jurors selected to try defendant's case, and there is no contention that defendant was denied full scope of that examination or that he utilized all of his peremptory challenges. Had defendant believed the entire jury panel was prejudiced against him by the judge's remarks, his remedy lay in a motion for continuance or for a new venire, neither of which was made.

[7] Defendant contends he was denied a fair trial because of a remark made by the presiding judge prior to the trial in a private conversation in chambers with defendant's father, who is an attorney. In an affidavit by defendant's father, which is included in the record on this appeal by stipulation of the solicitor, it is stated that the judge advised the affiant "that it was his policy to give an active sentence to any defendant appearing before him on a charge of driving under the influence if the jury returned a verdict of guilty," and that "he felt it his duty to protect the district court judges and that he felt that 'one roll of the dice or one bite of the cherry' was all that a defendant was entitled to." While again the judge's remark may have been ill-advised, we fail to see how it prejudiced defendant's trial. No juror heard it, and if the judge had a policy of giving active sentences when guilty verdicts were returned in driving under the influence cases, he made an exception in this case, where a suspended sentence was imposed. Defendant

State v. Dark

has failed to show how any of his rights were denied or prejudiced by the judge's remark.

Defendant assigns as error that the arresting officer and the officer who administered the breathalyzer test were allowed to testify over his objections that in their opinion defendant on the night of his arrest was under the influence of some intoxicating beverage. These assignments of error are overruled under authority of *State v. Mills*, 268 N.C. 142, 150 S.E. 2d 13, and *State v. Warren*, 236 N.C. 358, 72 S.E. 2d 763.

[8] Defendant's contention that the results of the breathalyzer test should have been excluded from evidence because the test was given following an invalid arrest has been answered by our holding that the arrest was valid. Even had defendant's arrest been technically illegal under North Carolina law, the results of the breathalyzer test would have been competent in evidence against him. *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706. The officer who administered the test testified as to his training and that he was a licensed breathalyzer operator at the time the test was given. He also testified that he administered the test in accordance with the rules and regulations issued by the State Board of Health. The results of the test were properly admitted in evidence. *State v. Powell*, 279 N.C. 608, 184 S.E. 2d 243.

[9] Defendant's fourteenth and final assignment of error is "[t]hat the court erred in its instructions to the jury. Exception No. 17 (R pp 44 and 45); and Exception No. 18 (R p 45)." Rules 19 and 21 of the Rules of Practice both in this Court and in the Supreme Court require that asserted error must be based on appropriate exception and must be properly assigned. These rules require that an assignment of error show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Lewis v. Parker*, 268 N.C. 436, 150 S.E. 2d 729; *Lancaster v. Smith*, 13 N.C. App. 129, 185 S.E. 2d 319. We have nevertheless reviewed the contentions made in defendant's brief as they relate to the court's charge to the jury and find no prejudicial error in the charge. Ordinarily, any inadvertence in stating the facts in evidence should be brought to the attention of the trial court in apt time to permit the court to make

State v. Faire

a correction. 1 Strong, N. C. Index 2d, Appeal and Error, § 31, p. 169. Here, defendant failed to call the trial judge's attention to any mistake in the court's recapitulation of the evidence, and we find none of the mistakes now complained of sufficiently material to warrant a reversal.

In defendant's trial and in the judgment appealed from we find

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. ELIJAH TYRONE FAIRE
AND CLARENCE CARR

No. 748SC535

(Filed 7 August 1974)

1. Indictment and Warrant § 10— incorrect middle name— motion to quash indictment

The trial court properly denied defendant's motion to quash the indictments against him on the ground that each bill incorrectly designated his middle name as "Tyrone" rather than as "Junior" since defendant was adequately identified in the indictments as the person charged and the mistaken designation of his middle name did not prejudice him at trial where the identification issue concerned his physical appearance rather than his name.

2. Kidnapping § 1; Robbery § 4— sufficiency of evidence

The State's evidence was sufficient for the jury in a robbery and kidnapping case where the victim positively identified defendants as the perpetrators of the crimes.

3. Criminal Law § 66— in-court identification— opportunity for observation

The trial court did not err in the admission of a taxi driver's in-court identification of defendants as the persons who robbed and kidnapped her where the *voir dire* evidence showed that 30 minutes elapsed between the time the victim picked up defendants and her release by them, that she was afforded a number of opportunities to observe defendants' physical appearance by reason of the street lights, the taxi's exterior and interior lights, the absence of disguises and blindfolds, her close proximity to her assailants, and their brutality toward her and her composed and alert behavior, and that the victim gave police a description of defendants' physical characteristics and clothing which was confirmed upon their apprehension later that evening.

State v. Faire

4. Criminal Law § 66— in-court identification — pretrial photographic identification

A conviction based on in-court identification following a pretrial photographic identification will be set aside only if the photographic identification procedure was so suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

5. Criminal Law § 66— photographic identification — legality

Photographic identification procedure was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification where a robbery and kidnapping victim examined a book containing over 50 photographs of Negro males but recognized no one, the victim thereafter examined a group of six photographs of black males of approximately the same age, including a photograph of defendant which had just been made after his arrest, the victim positively and unhesitatingly identified defendant as one of her assailants as soon as she saw his photograph, and officers did not tell the victim that they had just picked up two suspects and did not suggest in any way whom she should identify.

6. Constitutional Law § 32; Criminal Law § 66— photographic identification — right to counsel

The Sixth Amendment does not grant the right to counsel at photographic displays conducted by the prosecution for the purpose of allowing the witness to attempt an identification of the offender.

7. Criminal Law § 66— in-court identification — accidental confrontation at police station

Robbery and kidnapping victim's in-court identification of defendant was properly admitted, notwithstanding the victim identified defendant when she saw him sitting in a dispatcher's office at the police station while defendant was not represented by counsel, where the court found upon supporting *voir dire* evidence that the confrontation at the police station was unarranged and accidental and that the in-court identification was of independent origin.

8. Arrest and Bail § 3— arrest without warrant — legality

Defendant's arrest was legal under G.S. 15-41(1) where an officer saw defendant take a pistol from his pocket and place it under the front seat of the cab in which he was sitting; furthermore, defendant's arrest would have been justified under G.S. 15-41(2) since a robbery and kidnapping victim had given one of the arresting officers a description of her assailants and defendant fits the description of one assailant.

APPEAL by defendants from *James, Judge*, 10 December 1973 Session of Superior Court held in WAYNE County.

Each defendant was separately indicted for armed robbery and for kidnapping. The State's evidence showed that at about 6:00 p.m. on 28 October 1973, Shelby Jean Walker, a cab driver for the Savage Taxi Company in Goldsboro, N. C., was dis-

State v. Faire

patched to 111 Marion Street where she picked up the defendants, Clarence Carr getting into the front passenger seat and Elijah Faire into the back. As the cab crossed railroad tracks near Dillard Street, Faire grabbed Mrs. Walker by the hair, held a pistol to her temple, and shoved her into Carr's arms. Faire then climbed into the driver's seat, drove north on Williams Street for five minutes, and stopped behind the Open Air Market. Faire, holding Mrs. Walker at gunpoint outside the cab, removed approximately \$80.00 in cash from her wallet. Carr then took Mrs. Walker behind some nearby bushes and stripped off all her clothes. After some argument about whether to have sexual intercourse with her, the defendants ordered Mrs. Walker to lie down on the back seat, climbed into the front seat, and drove to the end of Olive Street. There, after further discussion, the defendants told Mrs. Walker that they intended to "get" another cab that evening and then allowed her to dress and drive away in her cab. Throughout these events, which lasted between 30 and 45 minutes, defendants several times threatened to kill and repeatedly struck and kicked her. After her release, Mrs. Walker immediately contacted the police, and the defendants were arrested shortly thereafter, Faire sitting in the back and Carr in the front seat of another Savage Taxicab. At the time of the arrest, the arresting officer observed Faire attempting to conceal a pistol, later identified by Mrs. Walker as the weapon used by defendants during commission of the crimes, beneath the front seat of the cab in which defendants were seated. Each defendant testified and denied having seen or ridden with Mrs. Walker at any time that evening. Each defendant was found guilty as charged and given consecutive prison sentences of 20-25 years for kidnapping and 18-20 years for armed robbery.

Attorney General Robert Morgan by Assistant Attorney General Rafford E. Jones for the State.

W. Dortch Langston, Jr., for defendant appellant Elijah Tyrone Faire.

David M. Rouse for defendant appellant Clarence Carr.

PARKER, Judge.

[1] Defendant Faire moved to quash the indictments against him on the grounds that each bill incorrectly designated his middle name as "Tyrone" rather than as "Junior," which he

State v. Faire

contents is his correct middle name as it appears on his birth certificate. The motions were properly overruled. The omission or mistake in designation of an accused's middle initial or name, he being otherwise adequately identified, will not invalidate an indictment, information, or other formal criminal accusation against him. Annot., 15 A.L.R. 3d 968; *cf. State v. Hester*, 122 N.C. 1047, 29 S.E. 380; *State v. Buck*, 6 N.C. App. 726, 171 S.E. 2d 10. Here, defendant Faire was adequately identified in the indictments as the person charged, and the mistaken designation of his middle name in no way prejudiced him at trial, where the identification issue concerned his physical appearance rather than his name.

[2] Defendants' motions for nonsuit were also properly overruled. At the trial Mrs. Walker positively identified defendants as the men who robbed and kidnapped her. Her testimony disclosed a reasonable possibility that she had observed her assailants sufficiently to permit subsequent identification, and the credibility of that identification was for the jury. *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902, cited by defendants, is distinguishable on its facts.

[3] Defendants next contend that the trial court erred in failing to suppress Mrs. Walker's in-court identification of them as the persons who had robbed and kidnapped her. At the close of an extensive voir dire, the trial court made detailed factual findings and concluded that Mrs. Walker's in-court identification of defendants was "lawful and regular in all respects." We agree. Plenary evidence was presented at the voir dire examination to support the trial court's lengthy findings of fact and its conclusion that Mrs. Walker had ample opportunity to observe the defendants during the kidnapping and robbery. Approximately 30 minutes elapsed between the time Mrs. Walker picked up the defendants and her subsequent release by them. Although it was dark throughout this period, street lights, the taxi's exterior and interior lighting, a lack of disguises and blindfolds, the close proximity of assailants and victim, their brutality towards her and her composed and alert behavior, combined to afford her a number of opportunities to observe the defendants' physical appearances. Mrs. Walker described these opportunities and testified to her determination to make the most of them. During her conversation with Goldsboro Police Sergeant Robert Wilson immediately after her release, Mrs. Walker was able to give a description of the defendants' physical

State v. Faire

characteristics and clothing, a description which was confirmed when defendants were apprehended by the police later that evening. On this record, the conclusion is compelling that when Mrs. Walker left defendants' presence, she carried with her an accurate mental image of each.

[4-6] Notwithstanding these facts, defendant Faire contends that his in-court identification was tainted by photographic identification procedure which occurred at the police station on the night of his arrest and which he contends was impermissibly suggestive. A conviction based on in-court identification following a pretrial photographic identification will be set aside only if the photographic identification procedure was so suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. U. S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968); *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Neal*, 19 N.C. App. 426, 199 S.E. 2d 143 (1973). In the present case, evidence at the voir dire disclosed that shortly after Mrs. Walker was released by her assailants, she was taken to the Goldsboro Police Station where she was asked to examine a book containing more than fifty photographs of Negro males. She did so, but recognized no one. Later during the same evening she was shown a group of six photographs, all in black and white and all of black men. One was a picture of defendant Faire which had just been made after he had been arrested and brought to the station. The other five had been picked at random by one of the officers from pictures of black males as near the age of Elijah Faire as possible. Mrs. Walker positively and unhesitatingly identified Faire as one of her assailants as soon as she saw his picture. At the conclusion of the voir dire the court made detailed findings of the foregoing facts and further found that at the time the group of six photographs was shown Mrs. Walker, the officer did not tell her that they had just picked up two black males and did not suggest in any way whom she should identify. The evidence fully supports the court's findings and conclusion that Mrs. Walker's in-court identification of defendant Faire was of independent origin and was not tainted by any out-of-court photographic identification procedure so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Nor does the fact that defendant Faire was in custody but was not represented by counsel when the photographic identification occurred render the in-court identification inadmissible. The Sixth Amendment does not grant the

State v. Faire

right to counsel at photographic displays conducted by the prosecution for the purpose of allowing the witness to attempt an identification of the offender. *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed. 2d 619 (1973). The in-court identification testimony of Mrs. Walker was properly admitted against defendant Faire.

[7] After Mrs. Walker identified the picture of Faire and as she was leaving the police station, she passed the dispatcher's office and, looking through an open door, saw defendant Carr. She identified Carr to the police as one of her attackers. At the conclusion of the voir dire hearing the trial judge found that this confrontation was unarranged and accidental and that Mrs. Walker's in-court identification was of an independent origin. These findings, supported by competent evidence, are binding on appeal and dispose of defendant Carr's assignments of error directed to allowing Mrs. Walker's in-court identification testimony against him. *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50. The fact that Carr was not represented by counsel at the time Mrs. Walker saw him in the police station did not require exclusion on constitutional grounds of her in-court identification testimony. *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972).

[8] Defendant Faire's contention that he was illegally arrested is not supported by the record. Officer May, who made the arrest, testified that as he approached the cab in which defendants were seated, he saw Faire take a pistol from his right front pocket and throw it underneath the front seat. The officer immediately arrested Faire for carrying a concealed weapon, and this arrest was clearly legal under G.S. 15-41(1). In addition, at the time of this arrest, Officer Wilson, who accompanied Officer May, had already interviewed Mrs. Walker and had received from her a description of the two men who had assaulted her. The arrest would also have been justified under G.S. 15-41(2).

We have carefully examined all of appellants' remaining assignments of error and find no prejudicial error such as would warrant the granting of a new trial. Accordingly, in the trial and judgments appealed from we find,

No error.

Judges CAMPBELL and BRITT concur.

State v. Roberts

STATE OF NORTH CAROLINA v. JAMES C. ROBERTS

No. 7414SC355

(Filed 7 August 1974)

**Constitutional Law § 30— fourteen months between offense and trial —
no denial of speedy trial**

Defendant's right to a speedy trial was not abridged where fourteen months elapsed between the offense and trial, the delay was due to a crowded court docket, defendant did not communicate his request for a speedy trial to the solicitor until the month before the case was tried, and defendant did not show any prejudicial effect of the delay.

APPEAL by defendant from *Clark, Judge*, 3 December 1973 Session of DURHAM County Superior Court.

The defendant was tried and convicted at the 18 September 1972 Session of Durham County Superior Court for the felony of kidnapping and the misdemeanor of assault upon a female under the age of twelve. That case was appealed to this court and was decided by opinion reported at 18 N.C. App. 388. This court held that the trial was free from prejudicial error and the sentence was affirmed. However, the case was remanded to the Superior Court with directions to conduct a hearing to determine the reason for the delay and to allow the defendant to present evidence upon the question of the delay. The presiding judge was instructed to enter an order vacating the judgment if he found that the defendant's constitutional right to a speedy trial had been violated. If the presiding judge determined that the constitutional right of a speedy trial had not been denied, he was instructed to find the facts and enter an order denying the motion to dismiss and order commitment to issue in accordance with the judgment previously entered.

A hearing was conducted as directed and both the solicitor and the defendant testified. Following the hearing the court made findings of fact and concluded that the defendant's right to a speedy trial was not violated. From this ruling the defendant gave notice of appeal.

The State's evidence tended to show that the defendant was arrested by a warrant issued 19 July 1971, charging him with assaulting a seven-year-old girl on the previous day. The defendant made bond and was released. On 4 August 1971, the defendant was arrested and charged with the felonies of store

State v. Roberts

breaking and larceny. An \$8,000.00 bond was set and the defendant being unable to secure said bond remained in jail. On 17 August 1971, the Grand Jury returned a true bill of indictment charging the defendant with assaulting the child with intent to rape and with kidnapping her. Bond in these matters was set in the amount of \$5,000.00. On 30 August 1971, the defendant filed an affidavit of indigency with the clerk and an attorney was appointed to represent him.

All cases were docketed for trial for the term beginning 20 September 1971, but the defense counsel did not confer with witnesses and did not subpoena witnesses at this time. The cases were not heard but were docketed for the term beginning 4 October 1971. The store breaking and larceny charges were called first and took the entire week, a verdict of guilty being returned on 8 October 1971. The defendant gave notice of appeal from an active sentence imposed thereon, and was committed to Central Prison on the following day.

On 9 August 1972, the docket was prepared for the term commencing 28 August. On 25 August 1972, the defendant filed a motion to dismiss for lack of speedy trial and at the same time subpoenaed his witnesses for trial calendared the following Monday, 28 August. The defendant's counsel notified the solicitor that it was necessary for him to be at a court-martial hearing at Camp Lejeune Marine Base which would take two to four days and requested a continuance. The cases were continued for the term and were calendared for the week commencing 20 September 1972. The trial commenced 21 September 1972, and was concluded the following day. The defendant subpoenaed various witnesses but did not present any evidence at the trial. The defendant, twenty-three years of age at the time of the trial, was shown to have had a long juvenile record commencing at the time he was eleven years old. He had been involved in approximately ten cases and had served one felony sentence, and he had also previously been convicted of assault with intent to commit rape. The defendant was sentenced to an active sentence of sixty years for the kidnapping and six months for the assault.

The State further introduced the docket for all terms of court from the week commencing 20 September 1971 through 28 August 1972. During this period of time eight hundred and forty-four true bills had been returned by the Grand Jury. In addition to the felonies, misdemeanor cases appealed from the

State v. Roberts

District Court were disposed of. Further evidence showed that there were never less than seventy-eight defendants confined in the Durham County jail awaiting trial during this period of time, and that ninety-one were confined at the beginning of the Session at which this case was tried.

The defendant testified that he could have made bond in either the store breaking or the kidnapping case, but could not afford bond in both. He testified that he was very anxious and nervous over the pending kidnapping charges. He stated that he had written his lawyer about a dozen times requesting his lawyer to get the matter docketed and had had his wife call his attorney to inquire about the delay. He further testified that he had sent notes to presiding judges a couple of times while he was in jail, but the contents or dates of these notes were not in the record.

The defendant maintained that he had two witnesses who would have been available to testify in his behalf had he received a speedier trial. One witness was not identified nor was the expected testimony revealed. The defendant testified that Captain Seagroves of the Durham police could have testified in his behalf and would have stated that the victim of the kidnapping told the police chief that she went with the defendant voluntarily for a distance of seventy-five to one hundred feet. The defendant stated that his attorney had told him that Chief Seagroves had told the attorney that Chief Seagrove did not recollect such a statement.

Attorney General Robert Morgan, by Associate Attorney John R. Morgan for the State.

Loflin, Anderson and Loflin, by Thomas F. Loflin, III, for defendant-appellant.

CARSON, Judge.

There is, of course, no hard and fast rule to determine when a delay is unreasonable. The leading case of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.ed. 2d 101 (1972), sets forth four factors to be considered in determining whether the sixth amendment right to a speedy trial has been denied. These tests are (1) the length of the delay (2) the reason for the delay (3) the extent to which the defendant has asserted his right to a speedy trial, and (4) the prejudicial effect of the delay to the

State v. Roberts

defendant. The delay in the Barker case was in excess of five years and the U. S. Supreme Court did not hold that that was unreasonable per se. While our solicitors must strive to docket cases as soon as possible to insure swift application of justice, we cannot ignore the increasing case load in many districts, especially those which are predominantly urban. Neither can we ignore the natural and commendable inclination to prosecute or dispose of the jail cases as soon as possible. A thirteen month delay, nothing else appearing, is not unduly long as a matter of law. *State v. Rawlings*, 18 N.C. App. 476, 197 S.E. 2d 47 (1973); *State v. Wrenn*, 12 N.C. App. 146, 182 S.E. 2d 600 (1971).

The next factor to be considered is the reason for the delay. The crowded dockets and the number of prisoners in jail awaiting trial are certainly reasons for the delay. *State v. Brown*, 282 N.C. 117, 191 S.E. 2d 659 (1972); *State v. George*, 271 N.C. 438, 156 S.E. 2d 845 (1967). The dockets introduced into evidence show that Durham County Superior Court was kept quite busy during the period of time in question. The defendant points out that during several weeks the docket broke down on Thursday, or even Wednesday afternoon on one occasion, and the court was adjourned for the week at that time. The solicitor stated that the week the court ended on Wednesday was the week of the solicitors' conference and it was necessary for him and his staff to attend. While we consistently urge the solicitors to carefully prepare their dockets and to utilize the court's time in the best possible fashion, we must also recognize that there are occasions when dockets will break down and some amount of time will not be best utilized. The record before us shows that the Durham County solicitor has indeed been diligent in preparing his dockets during this year's period of time, and has utilized a very high degree of efficiency of the court's time.

The third factor to consider is the extent to which the defendant has asserted his right to a speedy trial. The defendant here has been represented by the same attorney from 30 August 1971, until this appeal was heard. Although the defendant maintained that he requested his attorney on numerous occasions to obtain a trial for him, the record does not show that any such request was communicated to the solicitor until 25 August 1972. Obviously, the State cannot be charged with knowledge of communication between the attorney and his client. When the matter for a speedy trial was filed on 25 August, the matter was already set for the week beginning 28 August 1972.

State v. Roberts

It was continued one more time at the defendant's request until the term of 20 September 1972, at which time it was disposed of. No significant delay was encountered from the time the motion for the speedy trial was filed until the matter was docketed and heard.

The fourth matter to be considered is the prejudicial effect, if any, to the defendant. The defendant contended that two witnesses would have been available to him had the matter been docketed earlier. One witness and his expected testimony were never identified. The only other witness is the Chief of Police of Durham. Chief Seagroves was not called upon to testify at the trial and we may only guess at what his testimony may have been. The statement of the defendant that the Chief had told his attorney, and the attorney had told the defendant, that the Chief could not recall the events which transpired a year ago, does not seem compelling to us to show that any prejudicial effect resulted to the defendant, especially considering the defendant offered no evidence whatsoever at the trial.

We hold that the trial court properly denied the defendant's motion to dismiss, and that the defendant did not suffer an unreasonable delay in violation of his rights guaranteed by the sixth amendment to the United States Constitution. *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965).

The order entered on 3 December 1973 directed that commitment issue in accordance with the judgment entered at the 18 September 1972 Session of that court. It then provided that he receive credit on his sentence for the period from the date of the original judgment and commitment, 22 September 1972 until 3 December 1973, and no other credit. The defendant was previously sentenced and credit was given under the provisions of G.S. 15-176.2. The pre-trial custody statute in effect at the time the latter order was entered was G.S. 15-196.1, effective 1 March 1973. The defendant should have been committed in accordance with the previous sentence pronounced 22 September 1972. Under its provisions, the defendant would have been given credit for all pre-trial time spent in custody from 17 August 1971 to 22 September 1972, and the judgment must be modified to this effect.

Modified and affirmed.

Judges BRITT and HEDRICK concur.

State v. Frinks

STATE OF NORTH CAROLINA v. GOLDEN ASRO FRINKS, EDWARD LEE ASKEW, KATHALEEN HARRIS AND PRENTICE SYLVESTER VALENTINE

No. 741SC267

(Filed 7 August 1974)

1. Criminal Law § 92— consolidation of cases — discretionary matter

The decision whether to consolidate cases for trial rests within the discretion of the trial court and will not be disturbed upon appeal where the defendants did not allege or show that harm resulted because of the consolidation.

2. Highways and Cartways § 10— obstructing highway — eyewitness's description of scene — relevance

In a prosecution for sitting, standing or lying upon a public highway or street in such a manner as to impede the regular flow of traffic the trial court did not err in admitting into evidence testimony describing the scene at the time and place in question by two witnesses who were operators of separate cars and who were forced to halt their vehicles because of the marchers in the street, even though the witnesses could not identify defendants as being among the group which attacked the vehicle of one of the witnesses.

3. Highways and Cartways § 10— obstructing of highway — sufficiency of evidence

In a prosecution for sitting, standing or lying upon a public highway or street in such a manner as to impede the regular flow of traffic in violation of G.S. 20-174.1, evidence was sufficient to be submitted to the jury where it tended to show that a group of fifty or sixty people, including defendants, marched without a permit along the streets of Edenton, blocked traffic, and attacked a vehicle which had been forced to stop.

4. Highways and Cartways § 10— obstructing highway — use of "feloniously" in instructions

Defendants were not prejudiced where the trial court in its instructions read the warrants charging defendants with "... feloniously" sitting in violation of G.S. 20-174.1, though the words "and feloniously" had been marked out in each warrant, since the court quoted to the jury the provision of G.S. 20-174.1 which does not contain the word "feloniously."

5. Criminal Law § 114— jury instructions — summary of testimony — no expression of opinion

The trial court's statement in summarizing for the jury a police officer's testimony "that he saw the blocking of the street which he described" did not amount to an expression of opinion in violation of G.S. 1-180.

State v. Frinks

6. Highways and Cartways § 10— obstructing highway — elements of offense — sufficiency of instructions

In a prosecution for sitting, standing or lying upon a public highway or street in such a manner as to impede the regular flow of traffic, the trial court did not err in failing to charge that the elements of the offense must include the wilful standing in a public street in such a manner as to wilfully impede the regular flow of traffic.

7. Criminal Law § 138— severity of sentence upon retrial — necessity for explanation

There is no requirement that the superior court, after trial *de novo* upon appeal from a conviction in district court, must articulate its reasons for imposing a harsher sentence than was imposed in district court.

APPEAL by defendants from *Copeland, Judge*, 17 September 1973 Session of Superior Court held in CHOWAN County. Heard in the Court of Appeals 17 June 1974.

Defendants were each charged in warrants with sitting, standing or lying upon a public highway or street in such a manner as to impede the regular flow of traffic, in violation of G.S. 20-174.1.

Defendants entered pleas of not guilty in Chowan County District Court, and appealed the guilty verdicts and imposition of sentences to the Superior Court for trial *de novo*. In the Superior Court, the cases were consolidated for trial, and the defendants pleaded not guilty.

The State's evidence tends to show that on 17 May 1973, a group of fifty to sixty black people were marching west on the paved portion of Freemason Street, occupying the left portion of the street, in Edenton, North Carolina. Freemason Street is approximately eighteen feet wide with no sidewalks or curbing. Defendant Frinks was on the north side of the group walking down the center of the street; Defendant Askew was about a fourth of the way back within the group.

As the group continued along Freemason Street across its intersection with Broad Street, they blocked the street. Two automobiles and a log truck proceeding along Broad Street were forced to stop. The two automobiles were driven by Valeria Roberts and Dorothy Owens. The Roberts vehicle was surrounded by members of the marching group, who pounded the windshield and hood of the vehicle with their fists; and one marcher pulled the hair of Mrs. Roberts' little girl.

State v. Frinks

In marching west on Freemason Street, the group had the street blocked in such a manner as to keep traffic behind or force a vehicle to pull off the road onto the shoulder. The group made a left turn onto Granville Street and proceeded south for two blocks, where the group made a left turn onto Albemarle Street. As the group turned onto Albemarle Street, it completely blocked the intersection and both streets, while singing "We Shall Not Be Moved," "They Ain't No Policeman Going to Turn Us Around," and cheering "Black Power," "Red Power," and "Soul Power."

After the group had marched one hundred feet along Albemarle Street, it moved to the sidewalk on the north side of the street, where a number of Highway Patrol and police vehicles pulled alongside the group. Captain C. H. Williams, of the Edenton Police Department, along with other officers, approached Defendant Frinks and advised defendant that he was placing the entire group under arrest for marching without a permit and blocking traffic. Defendant Frinks replied, "You can't do that," and fell to the sidewalk, followed in a like fashion by most of the group. Approximately twenty-three or twenty-four members of the group were arrested.

At the close of State's evidence, defendants moved for judgment as of nonsuit as to each defendant. The motions were denied.

The defendants offered no evidence.

The jury returned verdicts of guilty as charged as to each defendant. Defendant Frinks was sentenced to imprisonment for a term of six months. Defendant Askew was sentenced to imprisonment for a term of three months. Defendant Harris was sentenced to imprisonment for a term of six months. This sentence was suspended, and Defendant Harris was placed on probation. Defendant Valentine was sentenced to imprisonment for a term of three months.

Each defendant appealed, bringing forward the same assignments of error.

Attorney General Morgan by Assistant Attorney General Matthis, for the State.

Leroy, Shaw, Hornthal & Riley, by Charles C. Shaw, Jr., for the defendants.

State v. Frinks

BROCK, Chief Judge.

[1] Defendants contends the trial court committed error in allowing consolidation of the case against Defendant Frinks with the cases against the other three defendants.

“Ordinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense(s).” *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858.

Defendants do not allege that harm resulted because of the consolidation. The decision whether to consolidate cases for trial rests within the discretion of the trial court, which will not be disturbed upon appeal unless the movant has been denied a fair trial due to the consolidation. This assignment of error is overruled.

Defendants contend the trial court committed error in denying defendants’ motion to strike specific testimony of Captain C. H. Williams.

The testimony complained of was elicited by counsel for defendant on cross-examination and was clearly responsive. The testimony was as follows:

“ . . . I believe the defendant Askew was on the south side of the group and was one of the ones that went over to this vehicle which was stopped. To the best of my knowledge, he was one of them. I did see Askew in the street. He was in the group, near the front when I first observed the group.

“Q. I am talking about on Main Street or Broad Street.

“A. I say, from the best of my knowledge, he was one of the ones that walked from the group to the vehicle.

“MR. WHITE: I move that answer be stricken.

“COURT: OVERRULED.”

It is clear that the witness had already testified to the same thing and that, under pressure from defense counsel, he merely restated what he had said before, albeit he used slightly different words. This assignment of error is feckless.

State v. Frinks

[2] Defendants contend the trial court committed error in admitting irrelevant and prejudicial testimony of the witnesses Roberts and Owens as to the attack on the Roberts vehicle by unidentified persons.

The witnesses Roberts and Owens were operators of separate automobiles, who were forced to halt their vehicles because of the presence of the group of marchers who obstructed the street. Although the witnesses could not specifically identify defendants as being among the group which attacked the Roberts vehicle, they, nevertheless, described the scene at the time and place in question. Upon objection by defendants, the trial judge restricted the testimony for corroborative purposes. It is not clear why the trial judge so restricted it. The testimony seems to be competent to describe the scene, even though these particular witnesses could not identify anyone. The identification came from other witnesses. Nevertheless, defendants are in no position to complain. The ruling of the court was more advantageous to defendants than they were entitled to have.

[3] Defendants contend the trial court committed error in refusing to allow defendants' motion for judgment as of nonsuit at the conclusion of State's evidence.

Upon consideration of a motion for judgment as of nonsuit in a criminal case, the evidence of the State is taken to be true and is entitled to every reasonable inference and intendment therefrom. The motion is properly denied if there is any evidence to support the allegation in the warrant or bill of indictment. 2 Strong, N. C. Index 2d, Criminal Law, § 106. This assignment of error is overruled.

[4] Defendants contend the trial court committed error in its charge to the jury when it read the warrant which charged defendants with " . . . feloniously" sitting in defining the violation of G.S. 20-174.1.

Defendants were all charged in warrants with a violation of G.S. 20-174.1, in that each defendant "did unlawfully, wilfully, sit, stand, or lie upon a public highway or street in such a manner as to impede the regular flow of traffic," In each warrant, a line was drawn through the words, "and feloniously." The trial judge, in reading the warrants to the jury, failed to omit the words, "and feloniously."

A charge must be construed in its entirety in the context in which it was given. "When thus considered, if it 'fairly and

State v. Frinks

correctly presents the law, it will afford no ground for reversing the judgment, even if an isolated expression should be found technically inaccurate.' " *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901.

In reviewing the charge in its entirety, we find the trial court quoted the provision of G.S. 20-174.1, which does not contain the word, "feloniously." Defendants fail to point out any prejudice to them by the inadvertence in reading the warrant, and we fail to see how defendants could have been prejudiced by it.

[5] Defendants contend the trial court committed error in using language that expressed an opinion of the trial court in summarizing the testimony of Officer W. C. Cramm.

Officer Cramm had testified as follows:

"The blacks (members of the group of marchers) were still in the intersection when I stopped and when the cars which came up beside me stopped. The blacks were right in front of the stopped vehicles. The vehicles had the choice of stopping or running over the people in the street."

The trial court, in summarizing Officer Cramm's testimony, stated "that he saw the blocking of the street which he described." We fail to see how this reasonable summary of the testimony expresses an opinion or conclusion which denies defendants the impartiality required by G.S. 1-180. This assignment of error is overruled.

[6] Defendants contends the trial court erred in its charge to the jury by failing to explain correctly the elements of the offense charged in the law arising from the evidence in failing to charge that the elements must include the willful standing in a public street in such a manner as to *willfully impede* the regular flow of traffic.

"[I]t is quite clear that the legislature intended to make it unlawful for any person to impede the regular flow of traffic upon the streets and highways of the State by willfully placing his body thereon in either a standing, lying or sitting position. A person may stand and walk, stand and strut, stand and run, or stand still. All these acts are condemned by the statute when done willfully in such a manner as to impede the regular flow of traffic upon a

State v. Collins

public street or highway." *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765.

The charge to the jury correctly applied the law to the facts. This assignment of error is overruled.

Defendants contend the trial court committed error in denying defendants' motion to set aside the verdict in each case as being contrary to the evidence. Such motion is addressed to the discretion of the trial court, and its denial of the motion is not reviewable upon appeal. This assignment of error is overruled.

[7] Defendants contend the trial court committed error by not affirmatively entering in the record the reason a more severe sentence was entered in the Superior Court than was entered in the District Court. This Court, in *State v. Butts*, et al., 22 N.C. App. 504, 206 S.E. 2d 806 (filed 17 July 1974), in an opinion by Judge Morris, has laid this argument to rest. There is no requirement that the Superior Court, after trial *de novo* upon appeal from a conviction in District Court, must articulate its reasons for imposing a harsher sentence than was imposed in District Court. See, *Colten v. Kentucky*, 407 U.S. 104, 94 S.Ct. 1953, 32 L.Ed. 2d 584 (1972). Defendants have failed to affirmatively show vindictiveness on the part of the trial court. This assignment of error is overruled.

In our opinion, defendants received a fair trial, free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES HENRY COLLINS AND
JESSE JOHNSON

No. 7420SC468

(Filed 7 August 1974)

1. Criminal Law § 169— unresponsive answer — no motion to strike — no prejudice

Where a witness was asked if he saw defendant after he gave defendant a gun, and the witness responded, "No, sir, the next thing I heard somebody said he done what he done," the court's failure to strike the answer was not prejudicial in the absence of a request.

State v. Collins

2. Criminal Law § 87— leading questions — allowance discretionary

The trial court in an armed robbery prosecution did not err in asking leading questions of a witness during a *voir dire* examination and in allowing the solicitor to ask the witness leading questions in the presence of the jury, since the trial judge has discretionary power to permit the use of leading questions and has the power to question a witness himself for the purpose of clarifying his testimony.

3. Criminal Law § 66— identification testimony — sufficiency of voir dire findings

The trial court's findings upon a *voir dire* examination that the witness's observation of the defendants during the robbery, including the kind of guns which they individually displayed, was the basis for his in-court identification and that the identification was not tainted in any way by his photographic observation or a lineup at the county jail were sufficiently specific and detailed.

4. Criminal Law § 80— testimony from notes — admissibility

Testimony of a witness from notes as to what the estranged wife of one defendant had told him did not prejudice appellants since (1) the testimony related only to a third defendant, (2) the record does not show that the witness was in fact reading from his notes but only that counsel for defendants believed he was doing so, and (3) even if the witness was reading from his notes, his testimony would not necessarily have been inadmissible, since there is nothing *per se* wrong with a witness's reading from a document in answer to a question if the words are responsive to the questions asked and if the witness can honestly state that after reading it he is able to recall the events about which he is testifying.

5. Criminal Law § 112— jury instructions — presumption of guilt — lapsus linguae

Trial court's *lapsus linguae* in instructing the jury that defendant was presumed to be guilty until proved guilty beyond a reasonable doubt was not prejudicial where the court several times in its charge correctly stated that defendants were presumed to be innocent and that the State must prove them guilty beyond a reasonable doubt.

APPEAL by defendants from *McConnell, Judge*, 12 November 1973 Session of Superior Court held in RICHMOND County.

Heard in Court of Appeals 19 June 1974.

Defendant appellants James Henry Collins and Jesse Johnson, along with another defendant, Walter Gainey Pegues, who has not appealed, were indicted and tried for armed robbery. The chief witness for the State at trial was James R. Frye, Jr. Frye testified that on the night of 10 July 1973 he was at Rib's Place, a tavern in Richmond County. About 8:30 p.m. he heard someone say, "Hey, stand up, they're robbing the place." He then saw defendant Collins standing behind the bar holding a

State v. Collins

shotgun. Defendant Pegues was standing over Shorty, an employee of Rib's Place, holding a shotgun at the back of his head. Defendant Johnson was at the door looking out. When Frye stood up, one of the defendants pointed a gun at him, and Pegues reached into Frye's pocket and took out about \$2 in change. A few minutes later defendants left Rib's place.

Before Frye identified defendants as the persons who had robbed him at Rib's Place, the court held a voir dire hearing to determine whether this identification testimony was admissible. During the voir dire hearing Frye testified that he had identified defendant Pegues in a lineup at the Rockingham jail one or two days after the robbery. He was also shown a group of photographs, and he identified two of them as photographs of Collins and Johnson. Frye testified that while Rib's Place "was not lit up like a stadium" at the time of the robbery, he nevertheless "could see very well." At the conclusion of the hearing the court found that Frye's identification of defendants was based on his observation of them at Rib's Place and was not tainted by any impropriety in the photographic identification procedures or the lineup at the Rockingham jail.

The State presented several other witnesses whose testimony supported that of Frye.

Each defendant took the stand and testified that he had not been in Rib's Place on 10 July 1973 and had not robbed James Frye. Josephine Pegues testified for defendants and stated that she was defendant Pegues' wife, but was separated from him; that she was living at the home of Irene Moore; and that defendant Pegues had been with her at Irene Moore's house from 7:40 p.m. on 10 July 1973 until 10:00 or 10:30 a.m. the next day.

Van Parker, an SBI agent, appeared as a rebuttal witness for the State. He stated that he had had an interview with Josephine Pegues prior to the trial. During this interview she told him that she did not see her husband on 10 July 1973, and that he did not arrive at Irene Moores' house until about 2:10 a.m. on July 11.

The jury found defendants guilty as charged, and they were sentenced to prison terms. Defendants Collins and Johnson appealed to this Court.

State v. Collins

Attorney General Morgan, by Assistant Attorney General T. Buie Costen, for the State.

Henry L. Kitchin and Benny S. Sharpe for defendant appellants.

BALEY, Judge.

[1] Fulton Junior Moore appeared as a witness for the State and testified that defendant Collins came to his home on July 10 and picked up a gun which Moore had been keeping for him. On cross-examination, counsel for defendants asked Moore: "And did you see him any time thereafter?" Moore answered: "No, sir, the next thing I heard somebody say he done what he done." This answer was hearsay and unresponsive to the question, but it did not accuse Collins of any specific crime and was of doubtful probative value. In the absence of a request, the court's failure to strike this answer was not prejudicial error.

[2] Defendants contend that the trial court erred in asking certain leading questions of the witness James Frye during the voir dire hearing, and also in allowing the Solicitor to use leading questions in his direct examination of Frye in the presence of the jury. This contention cannot be upheld. The trial judge has discretionary power to permit the use of leading questions in order to save time. *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384; *State v. Clanton*, 278 N.C. 502, 180 S.E. 2d 5; *State v. Painter*, 265 N.C. 277, 144 S.E. 2d 6. He also has the power to question a witness himself for the purpose of clarifying his testimony. *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59; *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376, *cert. denied*, 393 U.S. 1087; *State v. Case*, 11 N.C. App. 203, 180 S.E. 2d 460.

[3] Defendants next assert that the court erred in admitting the identification testimony of the witness Frye, because its findings of fact made at the conclusion of the voir dire hearing were not sufficiently specific and detailed. The court found from Frye's testimony that his observation of the defendants during the robbery, including the kind of guns which they individually displayed, was the basis for his in-court identification, and the identification "was not tainted in any way by his photographic observation or lineup at the Richmond County Jail." "When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the

State v. Collins

trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts." *State v. Tuggle*, 284 N.C. 515, 520, 201 S.E. 2d 884, 887; *State v. McVay*, 277 N.C. 410, 417, 177 S.E. 2d 874, 878; *accord*, *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27; *State v. Willis*, 20 N.C. App. 365, 201 S.E. 2d 588.

Defendants' next assignment of error relates to the denial of their motions for nonsuit. The court quite properly denied these motions, for the evidence is amply sufficient to support defendants' convictions.

[4] When Van Parker testified as a rebuttal witness for the State, the following proceedings occurred:

"WITNESS: I talked with Josephine Pegues. She made a statement about the evening and night of July 10, 1973.

"Q. What did she say?

"A. She informed me that —

"OBJECTION. OVERRULED.

"MR. KITCHIN [counsel for defendant]: Object to Mr. Parker reading from said document up there.

"MR. LOWDER: [Solicitor]: Objection to the conclusion of counsel, if your honor please.

"MR. KITCHIN: Could the record state that Mr. Parker is reading from some document?

"COURT: Are you using your notes to refresh your recollection?

"A. Yes, sir, I am.

"COURT: Don't read from them.

"Q. Tell in your own words what she said to you happened on that evening.

"A. On July 10, 1973 that the defendant and herself were not living together.

"COURT: What defendant?

"A. Pegues, and that she was living with a cousin, Irene Moore, and that the defendant Pegues was staying

State v. Collins

with his mother. She informed me that she did not see the defendant Pegues on July 10, 1973, and that it was approximately 2:10 A.M. on July 11, 1973 that the defendant came to the residence.

"MR. KITCHIN: He's reading straight from his notes again. Objection.

"OVERRULED."

Defendants contend that the court committed error in allowing Parker to read from his notes. This contention is not well founded. First, Parker's testimony related only to defendant Pegues, and it could not have been prejudicial to defendant appellants. Second, the record does not show that Parker was in fact reading from his notes, but only that counsel for defendants believed he was doing so; and the court specifically instructed him not to read from them. Third, even if Parker was reading from his notes, his testimony would not necessarily have been inadmissible. A witness may refer to a document for the purpose of refreshing his memory about certain events. If, after reading the document, he is able to remember the events, he may give testimony about them. *State v. Chance*, 279 N.C. 643, 185 S.E. 2d 227, *vacated and remanded on other grounds*, 408 U.S. 940; *State v. Peacock*, 236 N.C. 137, 72 S.E. 2d 612; 1 Stansbury, N. C. Evidence (Brandis rev.), § 32. When the witness is able to remember the events after reading the document to himself, the better practice is for him to describe them in his own words, rather than reading the document aloud. *State v. Peacock, supra*. But there is nothing *per se* wrong with his reading from the document in answer to a question, if the words of the document are responsive to the question asked, and if he can honestly state that after reading it he is able to recall the events about which he is testifying. Here the witness expressly stated that the use of his notes refreshed his recollection of the conversation with Mrs. Pegues, and his testimony was admissible whether or not he was reading from his notes.

At the conclusion of all the evidence defendants moved to dismiss all charges against them arising out of the robbery at Rib's Place, other than the cases then being tried. This motion was properly denied. The other charges against defendants were not before the court, and it had no authority to dismiss them.

State v. Beard

[5] At one point in its charge to the jury the court stated:

“Now, the State has offered evidence and as I have stated, the defendant is presumed to be guilty until the State has satisfied you from the evidence and beyond a reasonable doubt, and the State contends they have offered evidence from which you should be satisfied from the evidence and beyond a reasonable doubt of their guilt.”

Taken literally, this sentence does not make sense, as one could not be presumed guilty until proved to be guilty beyond a reasonable doubt. It seems clear that this is a *lapsus linguae* and that the jury could not reasonably have been misled. Several times in its charge the court correctly stated that the defendants were presumed to be innocent and that the State must prove them guilty beyond a reasonable doubt. The instructions to the jury must be considered as a whole, and an isolated portion of these instructions which at best may be ambiguous cannot be detached from the context of the charge and held to be prejudicial if the charge as a whole is correct. *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839; *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948.

Defendants have shown no prejudicial error in their trial.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES BEARD

No. 7425SC478

(Filed 7 August 1974)

1. Burglary and Unlawful Breakings § 10— possession of implements of housebreaking — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for possession of implements of housebreaking where it tended to show that defendant was a passenger in a vehicle which was stopped by a police officer, the officer noticed a police scanner, two walkie talkies and a pry bar inside the car, defendant and the driver accompanied the officer to the police station where a further search, made with the consent of defendant and the driver, revealed many more housebreaking implements, and defendant contended that the imple-

State v. Beard

ments found did not belong to him but were the property of a friend of his.

2. Criminal Law § 23— change of plea by co-defendant — failure to warn jury — no prejudice

Where a co-defendant changed his plea from not guilty to guilty of a lesser included offense at the conclusion of a *voir dire* and prior to the return of the jury there was no prejudice to defendant in the failure of the trial judge to give the jury a warning instruction.

3. Searches and Seizures § 2— failure to make findings on *voir dire*

Failure of the trial court to make findings of fact at the conclusion of a *voir dire* to determine the propriety of a search and seizure was not prejudicial error.

4. Criminal Law § 84; Searches and Seizures § 2— consent to search vehicle — legality of search

Evidence seized from the vehicle in which defendant was riding which he sought to suppress was not the product of an illegal search where defendant and a co-defendant consented to the search of the vehicle and the consent was voluntarily, freely, and understandingly given.

APPEAL by defendant from *Falls, Judge*, 13 November 1973 Session of Superior Court held in BURKE County. Heard in the Court of Appeals on 12 June 1974.

This is a criminal action wherein the defendant, James Beard, who was charged in a bill of indictment, proper in form, with possession of implements of housebreaking. The defendant's case was consolidated, over his objection, with an action against Ronald Clark. Both defendants entered pleas of not guilty; however, during the course of the trial co-defendant Clark changed his plea and the State accepted his guilty plea to a lesser offense.

After presentation of evidence by both the State and defendant, the jury returned a verdict of guilty. From a judgment imposing a prison sentence of not less than seven (7) years nor more than ten (10) years, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Norman L. Sloan for the State.

Hatcher, Sitton, Powell & Settlemyer by Douglas F. Powell for defendant appellant.

HEDRICK, Judge.

[1] We first discuss the defendant's contention that the trial court erred in not granting his motion for judgment as of non-

State v. Beard

suit. The defendant was charged with possession of housebreaking implements. Upon indictment for this crime under G.S. 14-55, the State has the burden of proving the following two things: (1) that the defendant was found to have in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute and (2) that such possession was without lawful excuse. *State v. Boyd*, 223 N.C. 79, 25 S.E. 2d 456 (1943).

Considering the evidence introduced in a light most favorable to the State, as we are obligated to do upon a motion for judgment as of nonsuit, we are of the opinion that the evidence is sufficient to require submission of the case to the jury. The State offered evidence that on 15 December 1972 at about 5:15 a.m., Officer Donald B. Clarke of the Morganton Police Department observed a 1967 Oldsmobile and noticed the car had a dealer tag on it. Officer Clarke had previously observed the vehicle twice that same night and upon seeing the vehicle a third time the officer followed the car for a short distance and then turned on his blue light. The car stopped almost immediately; and upon approaching the automobile, Officer Clark saw that defendant Beard was sitting on the right-hand seat of the Oldsmobile and that Ronald Clark was the driver. When the officer asked to see the driver's license and 96 hour permit of Ronald Clark, defendant spoke up and said, "He don't have to have one. I am the car dealer and he is trying out the car." The defendant then produced a 96 hour permit which had been issued to him; however, the permit had been issued on 14 October 1972 and had long since expired. The officer then noticed a police scanner (which was not working at the time), two walkie talkies, and a pry bar inside the car; and he requested the defendant and Clark to follow him to the police station.

At the police station, Officer Clarke interrogated defendant and Ronald Clark for approximately one hour and then made a search of the vehicle at the police station. This search was made with the consent of both Clark and the defendant, and the officer found the following items: two flashlights, two pairs of gloves and welding glasses. Later the Officer, acting pursuant to the consent of both parties and also having obtained a search warrant, uncovered the following items from the trunk of the car: a pair of bolt cutters, a large sledgehammer, a pruning saw, a portable cutting torch, pry bars, screwdrivers, a tire tool, a crowbar, handcuffs, a blue bag, bits, tape, and a blue and yellow notebook.

State v. Beard

The State also offered the testimony of Bill Sparks, a used car dealer in Gastonia, who testified that he first saw Mr. Beard on 14 October 1972. At that time Beard was issued a 96 hour permit in order that defendant might test drive the automobile. Sparks testified that although he had issued a permit for only 96 hours, the car had been gone for many months. He also stated that he had no knowledge of how or when the tools which were introduced into evidence were placed in the vehicle.

“While each of the articles found in the possession of the defendant has its legitimate use, it cannot be said that taken in combination these articles are tools of any legitimate trade or calling. There is no legitimate purpose for which this defendant and his companion could have the combination of articles found in their possession.” *State v. Baldwin*, 226 N.C. 295, 37 S.E. 2d 898 (1946).

Moreover, the defendant did not argue that the articles found in the car were not implements of housebreaking. Rather, his defense was based entirely upon the fact that these articles did not belong to him but were the property of Buddy Cobb, a friend of his. See, *State v. Vick*, 213 N.C. 235, 195 S.E. 779 (1938). Thus, this assignment of error is overruled.

[2] Defendant next contends that the trial court erred in failing “to instruct the jury not to consider the case further against co-defendant Clark, after Clark had tendered a plea midway through the trial of the case to a misdemeanor, thereby permitting the assistant district attorney to proceed against defendant Beard without any explanation whatsoever.” Defendant relies upon the case of *State v. Pearson* and *State v. Belk*, 269 N.C. 725, 153 S.E. 2d 494 (1967) to support this contention. In the latter mentioned case, a co-defendant withdrew his plea of not guilty at the beginning or early stages of the State’s evidence and entered a plea of guilty of common law robbery. This plea was accepted *in open court in front of the jury* and the court was careful to charge the jury that this circumstance did not relieve the State of its burden of proving each individual guilty by the evidence and beyond a reasonable doubt. It is clear that the case cited by the defendant is distinguishable from the case at hand. In the instant case the co-defendant Clark changed his plea to guilty as the conclusion of a *voir dire* and *prior* to the return of the jury. Thus, his plea was not made in open court before the jury. Although it may be surmised that the jurors were curious as to the whereabouts of the co-defendant Clark,

State v. Beard

we can see no prejudice resulting from the trial judge's failure to give a warning instruction. The trial judge abstained from making any comment whatsoever regarding the co-defendant's guilty plea, and this lack of emphasis by the trial judge, coupled with the absence of a request for a warning instruction from the defendant, renders this assignment of error nonmeritorious.

Defendant, by his assignments of error Nos. 3, 6, 7, 9, 10, 13, and 14, argues that the trial court committed error by (1) failing to make findings of fact at the conclusion of a *voir dire* conducted to determine the propriety of a search and seizure and (2) by refusing to suppress the evidence obtained by this search and seizure.

[3] As to the failure to make findings of fact at the conclusion of the *voir dire*, Justice Branch in *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967), made the following pertinent comment:

“While it is better practice for a judge on *voir dire* to make finding of fact and enter it in the record, a failure to do so is not fatal. The ruling that the evidence was competent was of necessity bottomed on the finding that the search was legal. *State v. Litteral*, 227 N.C. 527, 43 S.E. 2d 84.

The court fully granted defendant's request concerning a *voir dire*. The fact that defendant offered no contradictory evidence further negated the necessity for the judge to find facts. * * *

In the case *sub judice* the only witness to testify on *voir dire* was Officer Clarke and the defendant offered no contradictory evidence. Thus, in line with the language of *State v. Bell*, *supra*, we hold there was no prejudicial error in the court's failure to make findings of fact.

[4] We must, however, determine whether the evidence which defendant sought to suppress was the product of an illegal search and, therefore, inadmissible as fruit of the poisonous tree. In *State v. McPeak*, 243 N.C. 243, 90 S.E. 2d 501 (1955), it is said:

“It is well settled law that a person may waive his right to be free from unreasonable searches and seizures. A consent to search will constitute such waiver, only if it clearly appears that the person voluntarily consented, or permitted,

State v. McAuliffe

or expressly invited and agreed to the search. Where the person voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated. *State v. Moore*, 240 N.C. 749, 83 S.E. 2d 912 (where many cases are cited); *Zap v. U. S.*, 328 U.S. 624, 90 L.Ed. 1477; *People v. Preston*, 341 Ill. 407, 173 N.E. 383; 77 A.L.R. 631; 47 Am. Jur., Searches and Seizures, Sec. 71; 79 C.J.S., Searches and Seizures, Sec. 62."

An examination of the record discloses that the defendant, as well as the co-defendant Clark, consented to the search of the car. Furthermore, the uncontroverted evidence shows that this consent was voluntarily, freely, and understandingly given, and this consent was not the product of duress, coercion, or fraud. Inasmuch as the defendant's voluntary consent to the search negated the necessity for a search warrant, we believe no useful purpose would be served by our discussing defendant's contentions *vis a vis* the search warrant which was eventually obtained. See, 7 Strong, N. C. Index 2d, Search and Seizure, § 2, pp. 7-9.

Defendant has brought forward and argued several other assignments of error which we have carefully reviewed and find to be without merit.

The defendant was afforded a fair and impartial trial free from prejudicial error.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES GORDON MCAULIFFE

No. 7430SC367

(Filed 7 August 1974)

1. Narcotics § 1— presumption of possession of marijuana for sale— motion to quash properly denied

Defendant's motion to quash the bill of indictment against him was properly denied where the ground for his motion was the alleged unconstitutionality of the presumption that possession of more than five grams of marijuana is possession for sale.

State v. McAuliffe

2. Narcotics § 3— possession of marijuana with intent to distribute— relevancy of evidence

In a prosecution for possession of marijuana with intent to distribute, the trial court did not err in refusing to allow defendant to question an SBI agent as to the ownership of a health food store, since that matter was not directly related to the case.

3. Constitutional Law § 31— confidential informer— limitation of questions proper

The trial court did not err in refusing to allow defendant to ask questions concerning the identity and reliability of the informer whose information led to the issuance of a search warrant for his automobile.

4. Criminal Law § 99— whispering between judge and witness— no breach of judicial neutrality

The trial court did not depart from his judicial neutrality when he asked a witness questions in a whisper and received whispered answers where the questions dealt with the activities of a confidential informer and the trial court was attempting to determine if disclosure of the facts was necessary to aid in defendant's defense.

5. Criminal Law § 92— consolidation of cases against husband and wife— dismissal of charges against wife— no prejudice to husband

Where prosecutions against husband and wife for possession of marijuana with intent to distribute were consolidated for trial, the trial court did not err in informing defendants, upon their moving to dismiss at the close of the State's evidence, that he was inclined to dismiss charges against the wife but not against the husband and that each defendant had the right to present evidence or to remain silent, nor did it err in dismissing charges against the wife but not against the husband when neither presented any evidence, since that procedure did not deny to defendant husband the right to present evidence.

APPEAL by defendant from *Copeland, Judge*, 3 December 1973 Session of JACKSON County Superior Court.

The defendant was charged in a bill of indictment with the possession of marijuana with the intent to distribute in violation of G.S. 90-95. The defendant's wife was also charged with the same offense. The cases were consolidated for trial, and pleas of not guilty were entered by each defendant. A judgment as of nonsuit was entered as to the charges against the defendant's wife; the defendant was found guilty as charged. From the imposition of a five year active sentence, the defendant gave notice of appeal.

Special agent James T. Maxey of the State Bureau of Investigation testified that he had occasion to go to the residence of Norman Allen West at approximately 2:40 a.m., on 1 September 1973. Agent Maxey was accompanied by several other law en-

State v. McAuliffe

forcement officers. The defendant's residence was located at the Davis Trailer Park. Upon his arrival, he knocked on the front door of the trailer.

Agent Maxey had a conversation with the defendant upon his arrival. He warned the defendant of his constitutional rights and asked him if a 1967 blue Mustang in the driveway belonged to the defendant. The defendant did not answer; whereupon Agent Maxey informed the defendant that he had a search warrant to search the automobile and asked again if it belonged to the defendant. The defendant stated that it was his and gave a key to the trunk of the automobile to Officer Maxey.

A large aluminum suitcase was discovered in the trunk of the automobile. The suitcase contained twelve bricks of a greenish colored vegetable material. One of the bricks was analyzed and found to contain 721.6 grams of marijuana.

The defendant offered no evidence.

Attorney General Robert Morgan by Assistant Attorney General Edwin M. Speas, Jr., for the State.

George S. Daly, Jr., and Walter H. Bennett, Jr., for the defendant-appellant.

CARSON, Judge.

[1] Prior to the commencement of the trial, the defendant moved to quash the bill of indictment on the grounds that the presumption that possession of more than five grams of marijuana is possession for the purpose of sale, is unconstitutional. The denial of this motion to quash constitutes his first assignment of error. This assignment of error is without merit. Presumptions are lawful as long as there is a rational connection between the fact to be proved and the facts which create this foundation. *Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.ed. 2d 380 (1973); *United States v. Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L. ed. 2d 210 (1965). Our Supreme Court has held that it is within the authority of the General Assembly to provide by statute that proof of certain facts should be prima facie evidence of an ultimate fact, provided that there is rational connection between the fact proved and the ultimate fact assumed. *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961); *State v. Lassiter*, 13 N.C. App. 292, 185 S.E. 2d 478 (1971). These presumptions are not conclusive and do not affect the

State v. McAuliffe

burden of proof, but shift the burden of going forward with the evidence to the defendant. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); 2 Strong, N. C. Index 2d, Criminal Law, § 32. The General Assembly determined that possession of more than five grams (more than one ounce since 1 January 1974) created a presumption sufficient to allow the jury to find that possession was for the purpose of distribution. G.S. 90-95. The defendant in this case possessed approximately ten thousand grams. The jury was properly instructed as to the presumption. The defendant relies on the case of *Sharp v. Commonwealth*, 213 Va. 269, 192 S.E. 2d 217 (1972), as authority that the presumption is unlawful. The Virginia case was decided on a different statute. Virginia Code of 1950, Section 54-524.101(a), as amended. It did not set a specific amount, but allowed the possession of any of the substance as some evidence that it was possessed for the purpose of distribution.

[2] The defendant next objects to the trial court's refusing to let him ask certain questions of Agent Maxey on cross-examination. These questions were not directly related to this case but concerned the ownership of a health food store. It is well established in this jurisdiction that the questioning of the witness is largely within the sound discretion of the trial court. *State v. Hutson*, 10 N.C. App. 653, 179 S.E. 2d 858 (1971); 7 Strong, N. C. Index 2d, Trial, § 9. Here, quite lengthy examination was permitted by the court. We do not perceive that the court abused its discretion in curtailing questioning as to unrelated matters.

[3] The defendant next contends that the court committed error in not allowing him to ask questions concerning the identity and reliability of the informer whose information led to the issuance of the search warrant. Generally speaking, the prosecution is privileged to withhold from an accused disclosure of the identity of the informer. *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.ed. 2d 639 (1957); *State v. Boles*, 246 N.C. 83, 97 S.E. 2d 476 (1957). This privilege is designed to protect the public interest. *Roviaro v. United States*, *supra*; *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53 (1969). Although the circumstances of certain cases might outweigh the desirability of protecting the public interest, the instant facts do not support such a departure from the general rule. *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Johnson*, 13 N.C. App. 323, 185 S.E. 2d 423 (1971). There is no indication here that the informer was a participant in the crime. Furthermore, all evidence necessary to convict was from the direct observation

State v. McAuliffe

of the officers. Also, the defendant did not offer evidence of entrapment or other defenses. Under these circumstances, we do not feel that it was necessary to deviate from the general rule and to require the disclosure of the identity of the informer.

[4] In seeking to ask the officer certain questions concerning the identity of the informer, the defendant's attorney asked several questions such as whether the informer was using drugs. In response to some of these questions, the trial judge on several occasions asked the witness in a whisper whether the informer was doing these acts. The witness whispered the answers back to the judge, and they were not audible to the jury. The defendant contends that this is prejudicial and indicates that the trial court was departing from his judicial neutrality. Quite to the contrary, it appears to us that the trial court was attempting to determine whether these facts were true and, if so, whether their disclosure would be necessary to aid in the defense. This assignment of error is likewise without merit.

[5] At the conclusion of the State's evidence each defendant made a motion to dismiss the charges against him. The judge called defense counsel to the bench and informed them that he was inclined to dismiss the charges against the wife but not against the husband, if no further evidence was presented. Subsequently, he informed each defendant of his right to present evidence or remain silent. He advised them to consult with their attorneys before deciding. At the conclusion, he asked each defendant whether he desired to present evidence. Neither defendant desired to present any evidence, and each defendant rested. Whereupon, the trial court dismissed the charges as against the defendant's wife. The defendant husband contends that he was denied the right to present evidence by this action of the trial court. Such is obviously not the case. It appears that the trial court was being extremely cautious in warning the husband that he might present evidence which would be incriminating to his wife. While such warning is not required, it is certainly not prejudicial; and this assignment of error is without merit.

We have examined the remaining assignments of error and do not feel that any prejudicial error was committed by the trial court. We hold that the defendant had a fair and impartial trial.

No error.

Judges BRITT and HEDRICK concur.

State v. Curtis

STATE OF NORTH CAROLINA v. WILLIAM M. CURTIS

No. 744SC410

(Filed 7 August 1974)

1. Homicide § 15; Robbery § 3— evidence of “loud mufflers” on car — admissibility

The trial court did not err in allowing a detective to testify that an automobile belonging to defendant's friend had “loud mufflers,” since other testimony indicated that defendant had been seen in the company of that friend on the date the crime was committed, the victim in his dying declaration described his assailant's car as “souped-up,” a “hot kind of car, a race car,” and the witness's description of the sound of the vehicle as having loud mufflers was a layman's description which obviously could be understood by the jury.

2. Criminal Law § 88— cross-examination of defense witness

Trial court did not err in allowing the State to inquire of defendant's witness concerning a statement made by defendant in the witness's presence on the day after the homicide.

3. Criminal Law § 89— cross-examination of witness as to possession of marijuana — admissibility for impeachment

The trial court in a homicide and armed robbery case did not err in allowing the solicitor to question a witness of defendant with respect to the witness's possession of marijuana.

4. Homicide § 21; Robbery § 4— armed robbery — death by stabbing — sufficiency of evidence

Evidence in a homicide and armed robbery case was sufficient to be submitted to the jury where it tended to show that defendant and his victim were seen on a fishing pier and having coffee together, defendant took his victim about a mile from the pier where he robbed and stabbed him, the victim described his murderer's vehicle as a “souped-up” blue car with a raised rear end, a “hot kind of car, a race car,” and defendant was in possession of a blue car with a raised rear end on the day of the crime.

APPEAL by defendant from *Martin (Robert M.)*, Judge, 22 October 1973 Session of Superior Court held in ONSLOW County. Heard in the Court of Appeals on 17 June 1974.

Defendant was charged in two bills of indictment: (1) with the murder of Jesse L. Wilson, and (2) with the armed robbery of Jesse L. Wilson. When the cases were called for trial, the solicitor announced, in the homicide case, that the State would not seek a conviction of first degree murder, but would seek a conviction of second degree murder or manslaughter, as the evidence might justify.

State v. Curtis

The State's evidence tends to show the following: Approximately at midnight of 12 August 1973, defendant engaged in a conversation with Jesse L. Wilson on Paradise Pier at West Onslow Beach. Defendant told Wilson that they were catching fish at another pier, and invited Wilson to ride with him to see. After driving about a mile down the highway, defendant pulled over to the side of the road. He stated that surf fishing was in progress on the beach. Defendant and Wilson walked down on the beach. After getting to the beach, defendant drew a knife and demanded Wilson's wallet. Defendant removed the money (\$9.00), handed the wallet back and told Wilson he was going to kill him. Defendant then stabbed Wilson with the knife and ran. Wilson was able to pull the knife from his stomach and to make his way back to the highway. The foregoing account of events was gained through Wilson's dying declarations made to Mr. Thomas George Gurganus (Gurganus) and to Deputy Donald Thomas (Thomas).

Gurganus stopped on the highway to assist Wilson; but when he saw how serious the situation was, he drove to Paradise Pier to seek additional assistance. He found Deputy Thomas at the pier. After calling for an ambulance, Gurganus and Thomas returned to aid Wilson. In his statements, Wilson described his assailant as a young white male wearing a stocking cap and blue jeans. He described the car his assailant was driving as a "souped-up" blue car with a raised rear end, a "hot kind of car, a race car."

The State's evidence further tended to show that defendant was observed talking to Wilson (the deceased) at Paradise Pier during the late hours of the night in question; that they had coffee together in the snack shop; and that they left the pier together a short while before Wilson was found on the highway by Gurganus.

The State's evidence tended to show that defendant and one Wentworth were often seen together; that they were seen together during the day preceding and during the night in question; and that Wentworth owned a 1970 Chevelle SS, blue with a black vinyl top, which appeared to be jacked up in the rear and which had loud mufflers. Defendant was seen driving the Wentworth vehicle during the night in question.

Defendant's evidence tends to show that he and Wentworth spent the day preceding and the night in question at West On-

State v. Curtis

low Beach and Paradise Pier; that they drove there in Wentworth's blue Chevelle. They visited with a friend and then returned to Camp Geiger. Defendant testified that he did not meet Wilson at the pier and did not rob and stab him.

The jury found defendant guilty of second degree murder and guilty of armed robbery.

Attorney General Morgan, by Assistant Attorney General Wood, for the State.

Ellis, Hooper, Warlick, Waters & Morgan, by William J. Morgan, for the defendant.

BROCK, Chief Judge.

[1] Defendant contends the trial court committed prejudicial error in allowing Detective Jarman to testify that the Wentworth automobile had "loud mufflers."

Two witnesses prior to Detective Jarman had testified as to the description of a vehicle given by the victim in a dying declaration. The vehicle described was one in which the victim had ridden when he left the pier with his assailant. The vehicle was described by the victim as a blue souped-up car with a raised rear end, a hot kind of car, a race car.

The State's evidence tended to show that defendant and Wentworth were at Paradise Pier together on the night in question. Detective Jarman examined the Wentworth vehicle and described it as a blue 1970 Malibu, which appeared to be jacked up in the rear, and that when the engine was "raced," it had loud mufflers. Under the circumstances, a description of the Wentworth vehicle was relevant as a circumstance to be considered by the jury. The witness' description of the sound of the vehicle as having loud mufflers was a layman's description, which obviously could be understood by the jury. The witness was not required to describe the intensity of the sound in decibels.

"[I]n criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506.

The description of a "souped-up" blue car with a raised rear end, a "hot kind of car, a race car," in the victim's dying declara-

State v. Curtis

tion, coupled with the testimony of witnesses, which placed defendant in the company of the victim on the night in question, along with testimony that defendant was driving the Wentworth vehicle, and the detective's description of the Wentworth vehicle are all circumstances which were properly to be considered by the jury. This assignment of error is overruled.

[2] Defendant contends the trial court committed error in allowing the solicitor to ask a question which made reference to a statement not in evidence. This argument has no merit.

On cross-examination, the solicitor asked the witness Wentworth about a statement made by defendant in the witness' presence on the day after the homicide.

Clearly, the question was asked in good faith and it is permissible for the solicitor to employ leading questions on cross-examination. It was permissible for the State to inquire of defendant's witness concerning a statement made about the event by defendant in the witness' presence. This assignment of error is overruled.

[3] Defendant contends the trial court committed error in allowing the solicitor to question defendant's witness Wentworth as to possession of illegal drugs. The solicitor asked Wentworth if he had any marijuana with him in his car. Defendant's objection was overruled. Wentworth answered in the negative; however, he admitted the police found marijuana in his clothes, and he admitted the marijuana was his.

It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. Such questions relate to matters within the knowledge of the witness, not to accusations of any kind made by others. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174. This assignment of error is overruled.

[4] Defendant contends the trial court committed error in refusing to grant defendant's motion for dismissal at the close of defendant's evidence and at the close of State's rebuttal evidence.

" 'When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide

State v. Curtis

whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.' *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661." *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679.

Defendant attacks the credibility of the witnesses for the State by citing instances of inconsistencies in their testimony. The credibility of the witnesses' testimony is to be determined by the jury. There were sufficient circumstances presented by the evidence to make a *prima facie* case for submission to the jury. This assignment of error is overruled.

Defendant contends the trial court committed error in allowing questions and answers in the State's rebuttal evidence which were merely cumulative and did not contradict any evidence offered by defendant.

Rebuttal testimony by the witnesses tended to show that defendant and Wentworth were at the pier prior to and after the death of the victim. Their testimony was to the effect that defendant had stated that he had been given \$140.00 by the Marine Corps and would skip the country except that people would think he was guilty; also, that defendant stated that Dillon Wood had pointed him out as the murder of the victim. This evidence tended to rebut defendant's evidence. This assignment of error is overruled.

In our opinion, defendant received a fair trial, free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

Williams v. Town of Grifton

JEAN H. WILLIAMS AND HAROLD S. ROSE AND WIFE, RITA ROSE
v. THE TOWN OF GRIFTON, A MUNICIPAL CORPORATION

— AND —

IN RE: ANNEXATION ORDINANCE ADOPTED BY THE TOWN OF
GRIFTON, A NORTH CAROLINA MUNICIPAL CORPORATION, ON
JULY 27, 1972. (72 CVS 1511)

No. 743SC407

(Filed 7 August 1974)

1. Municipal Corporations § 2— annexation report amended — further public hearing not required

There is no requirement that a second public hearing is always necessary when an annexation report is amended.

2. Municipal Corporations § 2— annexation — water system for fire protection adequate

Finding of fact by the trial court that a proposed water system would provide adequate fire protection for an annexed area was supported by competent evidence and is conclusive on appeal.

APPEAL by petitioners from *Rouse, Judge*, 31 December 1973 Session of Superior Court held in PITT County.

On 9 May 1972 the Board of Commissioners of the Town of Grifton passed a resolution to consider annexation of two areas, designated as Tract No. 1 and Tract No. 2. As required by G.S. 160A-35, the Commissioners prepared and made available to the public an annexation report setting out plans for the extension of municipal services to the two tracts. A public hearing was held on 14 June 1972, and on 27 July 1972 the Board of Commissioners adopted an ordinance annexing the two areas. Shortly thereafter, petitioners filed a petition challenging the annexation, as permitted by G.S. 160A-38. The case was heard in the Superior Court of Pitt County, and it was appealed to this Court. In *Williams v. Town of Grifton* and *Parker v. Town of Grifton*, 19 N.C. App. 462, 199 S.E. 2d 288, this Court held that the water system planned for Tract No. 2 was not adequate to meet the requirements of G.S. 160A-35, because the water pressure in the fire hydrants planned for this tract would not be sufficient for fire protection purposes. The matter was remanded to the Grifton Board of Commissioners for modification of the proposed water system.

On 11 December 1973 the Board of Commissioners adopted a resolution amending the annexation report to provide addi-

Williams v. Town of Grifton

tional fire hydrants and water mains for Tract No. 2. No public hearing was held before this resolution was passed. On 27 December 1973 the Superior Court held a hearing on the proposed water system as modified by the December 11 resolution, and evidence was offered by the petitioners and the Town of Grifton. The court issued an order, with findings of fact and conclusions of law, on 2 January 1974. In its findings of fact the court stated that the revised water system "would provide fire protection to the Forest Hills Area (Tract No. 2) on substantially the same basis and in the same manner as such services are provided within the rest of the Town of Grifton," thus satisfying the requirements of G.S. 160A-35. The court ordered "[t]hat the Annexation Ordinance . . . adopted by the Board of Commissioners of the Town of Grifton, North Carolina, on July 27, 1972, be and the same is hereby affirmed without change." Petitioners appealed to this Court.

Wallace, Langley, Barwick & Llewellyn, by F. E. Wallace, Jr., for petitioner appellants.

Gaylord and Singleton, by L. W. Gaylord, Jr., for respondent appellee.

BALEY, Judge.

[1] Petitioners contend that the Board of Commissioners was required to hold a public hearing before amending the annexation report on 11 December 1973. Under G.S. 160A-37(d), before any territory may be annexed by a municipality, there must be a public hearing at which "all persons resident or owning property in the territory . . . and all residents of the municipality, shall be given an opportunity to be heard." The Board of Commissioners of Grifton held such a public hearing on 14 June 1972. Under G.S. 160A-37(e), after the public hearing has been held, the Board of Commissioners "shall have authority to amend the [annexation] report . . . to make changes in the plans for serving the area proposed to be annexed." G.S. 160A-37(e) contains no provision requiring a second public hearing before the annexation report may be amended.

In *Adams-Millis Corp. v. Kernersville*, 6 N.C. App. 78, 169 S.E. 2d 496, cert. denied, 275 N.C. 681, the Kernersville Board of Commissioners passed a resolution to consider annexation of certain territory, prepared an annexation report, and held a public hearing. The annexation report was made available

Williams v. Town of Grifton

to the public at least 14 days before the public hearing, as required by G.S. 160A-37(c). However, "[a]t the beginning of the hearing, the Mayor read certain recommended amendments to the annexation reports." *Id.* at 80, 169 S.E. 2d at 497. After the annexation ordinance was passed, petitioner contested the annexation, contending that the Commissioners were required to hold a second hearing at least fourteen days after the amendments were announced. This Court held that a second hearing was not required, in view of the provisions of G.S. 160A-37(e) (then codified at G.S. 160-453.5(e)) giving the Commissioners power to amend the annexation report. In the present case, likewise, a second public hearing should not be required. To hold that a public hearing is always necessary when an annexation report is amended would result in a proliferation of unnecessary hearings.

[2] Petitioners next contend that the Superior Court erred in finding as a fact that the proposed water system, as modified by the Board of Commissioners in the amendment of December 11, would provide adequate fire protection for Tract No. 2. However, this finding of fact is fully supported by the testimony of Willis Barlowe, a civil engineer employed by the Town of Grifton. At the hearing on December 27, Barlowe testified:

"Under this proposed plan, the people in this area annexed [will] have the same water pressure available for fire protection that the present citizens of Grifton now have. It will be at least comparable or better. Following development of the plans, the people in that area, that is the Forest Acres area, Tract No. 2, will have the same water pressure that the citizens of Grifton will then have. It will be equal or better."

Petitioners argued that the proposed water system would be adequate for the heavily populated northern area of Tract No. 2, but would not be sufficient for the more sparsely populated southern part of the tract. However, Barlowe testified:

"In developing this plan, the original and the amended plan, I did take into consideration houses South of this so-called Forest Acres area which would be in the annexed area. I know the location of these houses and I have located them on the plan. . . . The furthest distance of any of these from the proposed line is about 500 feet. . . . They could be served by running a line to them. . . . Generally, we put

Williams v. Town of Grifton

water lines in streets in serving the houses and the people run lines from the street to the house.”

Findings of fact made by the trial court are conclusive on appeal when supported by competent evidence. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373; *Trotter v. Hewitt*, 19 N.C. App. 253, 198 S.E. 2d 465, *cert. denied*, 284 N.C. 124, 199 S.E. 2d 663; *Coble v. Brown*, 1 N.C. App. 1, 159 S.E. 2d 259.

The Superior Court correctly determined that the annexation ordinance and annexation report, as amended by the Board of Commissioners on 11 December 1973, meet the requirements of G.S. 160A-35 and G.S. 160A-37 and may properly be put into effect. However, the court's order provides that “the Annexation Ordinance . . . adopted . . . on July 27, 1972, be and the same is hereby affirmed without change.” The annexation ordinance passed on 27 July 1972, in its original form, was invalid for the reasons stated in *Williams v. Town of Grifton* and *Parker v. Town of Grifton*, *supra*. The first paragraph of the mandate of the Superior Court's order should be modified to read as follows:

“FIRST: That the Annexation Ordinance entitled: ‘An Ordinance to Extend the Corporate Limits of the Town of Grifton, North Carolina, Under the Authority Granted by Part 2, Article 36, Chapter 160 of the General Statutes of North Carolina,’ adopted by the Board of Commissioners of the Town of Grifton, North Carolina, on July 27, 1972, as modified by said Board on December 11, 1973, in Resolution 73-23, be and the same is hereby affirmed.”

With this modification, the judgment of the Superior Court is affirmed.

Modified and affirmed.

Chief Judge BROCK and Judge BRITT concur.

State v. Gagne

STATE OF NORTH CAROLINA v. JOSEPH P. GAGNE AND BARRY L. BARBER

No. 743SC420

(Filed 7 August 1974)

1. Narcotics § 4— constructive possession of drugs — sufficiency of evidence

In a prosecution for possession of marijuana with intent to distribute and possession of tablets of phencyclidine hydrochloride, evidence was sufficient to be submitted to the jury where it tended to show that police officers entered a mobile home shortly after they observed defendants go in, an officer saw one defendant crush a vial of blue tablets in the living room of the trailer, vegetable material was found on the kitchen table and in a kitchen cabinet drawer, tablets were found underneath a false bottom of a trash can, and defendants admitted that they lived in the trailer.

2. Searches and Seizures § 4— search under warrant — requirement that entry be demanded and denied

Where a deputy sheriff knocked on defendants' door and informed them that he was a law officer and that he had a search warrant to search the trailer, the requirements of G.S. 15-44 were met in that the procedure used notified defendants that the entry was of an official nature and not an invasion of privacy.

3. Criminal Law § 102— solicitor's jury argument — propriety

In a prosecution for felonious possession of marijuana and phencyclidine hydrochloride, the trial judge did not abuse its discretion in overruling defendants' objections to the solicitor's jury argument concerning the case of a young child who had used drugs.

4. Narcotics § 5— first offense as misdemeanor — judgment of guilty of felony

Recitals in the judgments sentencing defendants to one year as committed youthful offenders that defendants were found guilty of a felony as a result of possession of phencyclidine hydrochloride are erroneous, since a first offense of G.S. 90-95(d) is a misdemeanor, while a second offense is a felony, and there is nothing in the record to indicate that defendants have been convicted previously of a violation of G.S. 90-95(d).

APPEAL by defendants from *Cowper, Judge*, 29 October 1973 Session of Superior Court held in CARTERET County. Heard in the Court of Appeals on 18 June 1974.

This is a criminal action wherein the defendants, Joseph P. Gagne and Barry L. Barber, were each charged in bills of indictment, proper in form, with felonious possession of marijuana with intent to distribute and with felonious possession of 130 tablets of phencyclidine hydrochloride.

State v. Gagne

Both defendants entered pleas of not guilty, and the jury returned verdicts of "guilty of simple possession of marijuana and simple possession of phencyclidine hydrochloride" as to each defendant. The cases were consolidated for judgment and each defendant was sentenced to be committed as a youthful offender to serve a term not to exceed one year.

The defendants appealed.

Attorney General Robert Morgan by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin for the State.

John H. Harmon for defendant appellants.

HEDRICK, Judge.

[1] Defendants first contend that the trial court committed error in denying their motions for judgment as of nonsuit.

"An accused's possession of narcotics may be actual or constructive. . . . Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972).

The evidence presented, when considered in the light most favorable to the State, is sufficient to show that on 10 May 1973 at approximately 2:10 a.m., Deputy Sheriff L. C. Swain of the Carteret County Sheriff's Department and several other law enforcement officials went to Bill's Trailer Court which is located near the town of Newport, N. C. Officer Swain had obtained a search warrant for the search of a mobile home located at this trailer court; however, upon finding the trailer unoccupied, Swain and the other law officers hid behind another trailer and awaited the return of the occupants. A few minutes later defendants arrived at the mobile home and went inside. Officer Swain then approached the front door of the trailer, knocked on the door, informed the occupants that he was a Deputy Sheriff, and that he had a search warrant to search the trailer. Immediately thereafter the deputy and the other officers entered the trailer.

As the officers entered the mobile home, defendant Gagne threw an item behind the stereo speakers and moments

State v. Gagne

later he attempted to stomp the item. Deputy Swain pushed the defendant aside and observed "a crushed plastic vial containing blue tablets and portions of blue tablets where they had been crushed."

Further search of the trailer yielded a tin foil packet of vegetable type material on the kitchen table and a quantity of loose green vegetable material in a kitchen cabinet drawer. The officers' investigation also revealed a trash can with the words "Do Not—(expletive deleted)—with Sam" written upon it. The officers observed a live copperhead snake in the trash can and after carefully transferring the snake into a paper bag, they discovered a false bottom in the trash can. Underneath the false bottom, they found three plastic vials containing 115 blue tablets.

Deputy Swain further testified, "I took each [defendant] separately into the rear bedroom away from everyone else and advised him of his constitutional rights. The only statement they said after I asked them did each one of them live there and they told me 'Yes' and which bedroom they lived in, but they did not make a statement so far as possession of the drugs. Yes, sir, they told me they lived there." Evidence was also introduced showing that each defendant possessed a key to the trailer.

Counsel stipulated that the laboratory report of the items seized could be introduced without objection. Results of the analysis showed the green vegetable material to be marijuana and the tablets to be phencyclidine hydrochloride.

This evidence, in our opinion is sufficient to raise an inference that the defendants were permanent residents of the mobile home, not transient visitors as asserted by defendants, and that they were in control of the premises and had knowledge of the controlled substances found therein. See, *State v. Balsom*, 17 N.C. App. 655, 195 S.E. 2d 125 (1973).

[2] Next, defendants argue that the trial court erroneously admitted into evidence the items found during the search of the mobile home. Defendants do not question the validity of the search warrant but rather contend that the rights of the defendants were violated by the manner of entry in that the officers conducting the search did not enter the premises after demanding and being denied admittance as required by G.S. 15-44.

State v. Gagne

G.S. 15-44 provides :

"If a felony or other infamous crime has been committed, or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be ground of belief."

This appears to be the rule even though the officers have obtained a search warrant or warrant of arrest, *State v. Moor-ing*, 115 N.C. 709, 20 S.E. 182 (1894), and regardless of whether the process is an arrest or search warrant, *State v. Covington*, 273 N.C. 690, 161 S.E. 2d 140 (1968).

In *State v. Shue*, 16 N.C. App. 696, 193 S.E. 2d 481 (1972), it is stated, "[t]he requirement that a police officer, armed with an arrest warrant or search warrant must demand and be denied admittance before making forcible entry, serves to identify his official status and to protect both the officer and the occupant. *State v. Covington*, *supra*."

In the instant case, Deputy Swain, prior to entering the trailer, identified himself as a law officer and informed the occupants of the trailer that he had a search warrant. This procedure satisfied the requirements of G.S. 15-44 in that "it served to notify the occupants that the entry was of an official nature and not an invasion of privacy, and to protect the officer[s] from being treated . . . as trespasser[s]" *State v. Rudisill*, 20 N.C. App. 313, 201 S.E. 2d 368 (1973). Thus, this assignment of error is overruled.

[3] Defendants also contend the trial court committed error in overruling their objections to an argument made to the jury by the solicitor. It is settled law in this jurisdiction that counsel is given wide latitude in the argument of the case to the jury and what constitutes an abuse of this privilege resides in the sound discretion of the trial judge. *State v. Spence*, 271 N.C. 23, 155 S.E. 2d 802 (1967). Defendants maintain that the Solicitor's remarks concerning the case of a young child who had used drugs were improper and tended only to inflame the prejudices of the jury. While we do not condone these statements, nevertheless, we do not believe the trial judge abused his discretion in his ruling on defendants' objection.

State v. Hackett

Defendants filed in this court on 30 May 1974 what purports to be a "motion in arrest of judgment". "A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. . . ." 3 Strong, N. C. Index 2d, Criminal Law, § 127, pp. 42-43.

[4] A careful review of the record proper discloses that the bills of indictment are proper in form and support the verdicts which in turn support the judgments sentencing the defendants to one year as committed youthful offenders. However, we note that the judgments contain the following recital: "Having been found guilty of the offense of possession of any quantity of phencyclidine hydrochloride and simple possession of marijuana which is a violation of and of the grade of felony and misdemeanor." Any person found guilty of simple possession of phencyclidine hydrochloride (a Schedule III controlled substance) shall, for the first offense, be guilty of a misdemeanor; while a person convicted of a second violation shall be guilty of a felony, G.S. 90-95(d). There is nothing in this record to indicate that the defendants have been convicted previously of a violation of G.S. 90-95(d). Therefore, the recital in the judgments that the defendants were found guilty of a felony as a result of possession of phencyclidine hydrochloride is erroneous, and the judgments are modified by striking the word *felony* as it relates to the conviction of the defendants for simple possession of phencyclidine hydrochloride.

In the defendants trial, we find no prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. WAYNE EDWARD HACKETT

No. 7421SC503

(Filed 7 August 1974)

1. Burglary and Unlawful Breakings § 5— break-in of business — sufficiency of evidence

In a prosecution for breaking and entering and conspiracy to break and enter, evidence was sufficient to be submitted to the jury

State v. Hackett

where it tended to show that defendant and two others were riding by a business establishment when one suggested that they break in, defendant was posted at the back door as a look-out while his companions went inside, the companions took money from a safe inside, but defendant was gone when they came back out, and defendant demanded his share of the money when he saw his companions at the home of a friend later on that same night.

2. Criminal Law § 77— statement by witness — necessity of *voir dire* to determine voluntariness

The trial court was not required to conduct a *voir dire* examination to determine if a witness's statement made to defendant's attorney was freely and voluntarily made, since declarations from a witness do not stand upon the same footing as confessions of one on trial for crime.

3. Criminal Law § 89— exclusion of prior inconsistent statement — prejudicial error

Since the evidence in a prosecution for breaking and entering and conspiracy to break and enter would not have been sufficient to support a verdict of guilty on either charge if the jury did not believe the testimony of the State's witness, the trial court erred in excluding a prior inconsistent statement made by the witness to defendant's attorney.

ON *Certiorari* to review the trial of defendant before *McConnell, Judge*, 13 August 1973 Session of Superior Court held in FORSYTH County. Heard in the Court of Appeals on 20 June 1974.

This is a criminal action wherein the defendant, Wayne Edward Hackett, was charged in bills of indictment, proper in form, with breaking and entering and conspiracy to break and enter. The defendant entered a plea of not guilty as to both charges.

After presentation of the evidence, the jury returned verdicts of guilty of breaking and entering and guilty of conspiracy to break and enter of the grade of felony. The cases were consolidated for judgment and it was adjudged that the defendant be imprisoned for the term of ten (10) years.

On 19 April 1974 this Court issued the Writ of *Certiorari*.

Attorney General Robert Morgan and Assistant Attorney General Parks H. Icenhour for the State.

Larry L. Eubanks for defendant appellant.

State v. Hackett

HEDRICK, Judge.

[1] Defendant contends the trial court erred in failing to grant his motions for judgment as of nonsuit. The evidence presented by the State tends to establish the following:

On 3 September 1971 defendant and two other men, Junior Cameron and Marvin Pennell, were riding down Cassell Street in Winston-Salem "in something like a mail cart, a three-wheel buggy-like vehicle". Marvin Pennell, the principal witness for the State, testified that:

"[T]hey rode by Royal Cake Company, and they looked at the place, and one of them mentioned there ought to be something in it.

* * *

He did not recall which one; but, anyway, they decided that they were going to break in and see what was in there and so all three of them in that little mail cart rode down the railroad tracks beside the Royal Cake Company to the back door"

Pennell further testified that all three of the men walked to the back door of the Royal Cake Company and that defendant was instructed "to watch for the law" while the other two men went inside. After opening the back door with a knife or screwdriver, the two men entered the building, took some money from a safe; and when they came back out, they discovered the defendant was gone. Later on that same night Pennell and Cameron found defendant at the house of a friend, and at that time defendant requested his part of the money. Cameron refused to give defendant any money; however, Pennell stated, "I think I had a pretty good bit of change I gave him. . . ."

Officials of the Royal Cake Company testified that the building was locked when they left the business on 3 September 1971 and that they gave no one permission to enter the building. Willis Gardner, controller of Royal Cake Company, testified that an inventory conducted by him after discovery of the break-in disclosed that \$529.63 in cash and \$799.70 in checks were missing from the safe.

This evidence, when viewed in the light most favorable to the State, is sufficient to withstand defendant's motions for nonsuit. Therefore, this assignment of error is overruled.

State v. Hackett

Next, we discuss defendant's assertion that the trial court committed error by not allowing defendant to impeach the witness Pennell by making references to a prior inconsistent statement made by Pennell. The background of the making of this prior inconsistent statement deserves attention. Before trial, defendant and his attorney, Larry L. Eubanks, visited Pennell at the Cherry Street prison camp. The attorney and his client engaged in a discussion with Pennell, after which the latter signed the following statement:

"State of North Carolina
County of Forsyth

I, Marvin David Pennell, do hereby solemnly swear that I know Wayne Hackett. Wayne Hackett did not ever plan or discuss with me or anyone else in my presence the breaking in at Royal Cake Company on Cassell Street nor did I ever say anything to him about him helping me do it.

Wayne Hackett did not participate, to my knowledge, in any break-in at Royal Cake Company with me or anyone else or in cracking the safe there. He did not discuss with me or anyone in my presence the safe-cracking at Royal Cake Company.

With regard to any participation by Wayne Hackett with a break-in at Thunderbird Drive-In, he never went into that place nor did he have anything to do with the break-in there.

This statement is made freely and voluntarily to Larry L. Eubanks, Attorney, and is not in any way coerced or untrue.

s/ MARVIN D. PENNELL

Witness: s/ SGT. H. D. ATKINS"

During the early stage of his cross-examination of the witness Pennell, defendant's counsel asked Pennell if he (Pennell) had given him an affidavit. At this point in the cross-examination, the State interposed an objection and requested that a voir dire be conducted. After holding a lengthy voir dire (the text of which composes 25 pages of the record), the trial judge made findings of fact and "exclude[d] the statement [made by Pen-

State v. Hackett

nell] and any further reference thereto in this trial." Defendant maintains that the trial court's exclusion of Pennell's statement deprived him of the use of a crucial impeachment device which was vital to defendant's ability to undermine the credibility of the State's principal witness. Conversely, the State submits that the defendant was afforded full cross-examination of the witness upon every phase of his examination-in-chief and that this was sufficient. However, the State further argues that even if it was error to exclude the statement that such error was not so prejudicial as to require a new trial. We agree with defendant's contention for the reasons stated below.

[2] First, we note that the voir dire conducted by the trial court, which was ostensibly held for the purpose of determining if Pennell's statement was freely and voluntarily made, was an unnecessary procedure. Although recognizing the unusual circumstances of this case, we are not without authority for such a conclusion. In *State v. Williams*, 91 N.C. 599 (1884), our Supreme Court determined that even if the statements made by the witness were involuntary and coerced this would not be a sufficient reason for withholding them from the jury as "[s]uch declarations from a witness do not stand upon the same footing as confessions of one on trial for crime, superinduced by fear or hope" *State v. Williams, supra*, at p. 603. Therefore, the statement in the instant case being admissible for impeachment purposes, regardless of whether the statement was voluntarily made or not, the holding of a voir dire was unnecessary.

[3] The testimony of the witness Pennell was critical to the State's case against the defendant as his testimony, if believed by the jury, was sufficient to convict the defendant of both offenses. If his testimony was not believed, the evidence would not have been sufficient to support a verdict of guilty on either charge. For this reason the defendant was entitled to impeach the testimony of Pennell by using the prior inconsistent statement as a basis of his cross-examination. The jury, acting as sole judges of the credibility of the witness Pennell, should have been allowed to decide if this statement so impeached the credibility of the witness as to render unbelievable his previous testimony on direct examination. See, *State v. Williams, supra*.

The defendant has brought forward and argued several other assignments of error which we do not discuss as they are unlikely to recur upon retrial of this case.

Hayman v. Ross

New trial.

Chief Judge BROCK and Judge CAMPBELL concur.

WILBUR ZACK HAYMAN v. MARY N. ROSS

No. 7430SC347

(Filed 7 August 1974)

1. Brokers and Factors § 1— sale of real estate by broker

The owner of land in this jurisdiction may sell his land through an agent and the agent may sign a contract to sell and convey in his own name or in the name of his principal(s).

2. Brokers and Factors § 4; Vendor and Purchaser § 5— specific performance of real estate contract — agreement oral — power of broker

Trial court properly granted defendant's motion for summary judgment in plaintiff's action for specific performance of an alleged contract for the sale of real property where the evidence showed that any agreement between plaintiff and defendant with respect to the sale of the property in question was oral, that a broker who received plaintiff's check as a binder on the property and who wrote defendant informing her of the terms of the alleged agreement was acting solely on behalf of plaintiff, and that the broker was not authorized, either expressly or impliedly, by the defendant to act on her behalf.

APPEAL by plaintiff from *Thornburg, Judge*, 26 November 1973 Session of Superior Court held in MACON County. Heard in the Court of Appeals on 11 June 1974.

This is a civil action wherein the plaintiff, Wilbur Zack Hayman, seeks from defendant, Mary N. Ross, specific performance of an alleged contract for the sale of real property, damages, and an accounting for all rents and profits received from said property on and after the date of this action.

A survey of the record reveals the following: Plaintiff and his wife operate a ladies' clothing store in Highlands, N. C., during the summer months of the year. Likewise, defendant, who lives in Florida, is engaged in the business of selling ladies' clothing. In the fall of 1972 the plaintiff's lease expired and he began to make inquiries as to the availability of another building to house the business. On 3 January 1973 plaintiff telephoned defendant and discussed with her the possibility of purchasing a building she owned in Highlands. This conversation

Hayman v. Ross

was followed by a telephone call and a letter to plaintiff from Mr. Herbert R. Davis, defendant's agent. The letter described in detail the property in question, disclosed the existence of a mortgage on said property, and concluded by stating, "After you have had an opportunity to have a survey and appraisal made, we will be pleased to discuss with you in detail selling or leasing arrangements."

For the next two weeks the parties continued to exchange letters and conduct negotiations via telephone and on 22 January 1973, plaintiff decided to purchase the property. On this date plaintiff instructed Frank B. Cook, a licensed realtor in Highlands, to telephone Mr. Davis and make an offer. Plaintiff also talked with Mr. Davis at that time and Davis said he would call back after conferring with the defendant. Davis called back shortly thereafter and reported that defendant had decided to accept the offer. Then, according to the depositions of the plaintiff, "... I told him I would give Mr. Cook a check for a binder on the property and Mr. Cook would prepare a letter acknowledging receipt of the check and mail it to him Not a memorandum of the terms of the sale, a confirmation of the sale of the property, because they had agreed, both of them over the telephone, to both of us, that they would accept the price of \$60,000."

The aforementioned letter was written by Frank B. Cook on the 27th of January 1973 and mailed to defendant. On 29 or 30 January 1973 the defendant telephoned plaintiff and informed him that she had decided not to sell the property. Subsequently, the plaintiff and defendant entered into further negotiations; however, these negotiations terminated when the parties could not agree on the terms of sale.

On 6 March 1973 the plaintiff filed a complaint seeking specific performance of the agreement between the parties as stated in the paper writing of 27 January 1973. Plaintiff alleged that he had duly performed all the conditions of the contract and "was at all times and still is ready, willing and able to complete the said contract on his part." Plaintiff further alleged that the defendant had failed to perform her part of the contract.

On 17 November 1973 the defendant, acting pursuant to Rule 56(b) of the Rules of Civil Procedure, filed a motion for summary judgment. On 4 December 1973 summary judgment was granted for the defendant, and the plaintiff appealed therefrom.

Hayman v. Ross

Jones, Jones & Key, P.A., by Richard Melvin for plaintiff appellant.

Adams, Hendon & Carson, P.A., by George Ward Hendon and J. Horner Stockton for defendant appellee.

HEDRICK, Judge.

The one question presented on this appeal is whether the uncontroverted facts entitle the defendant to judgment as a matter of law.

Since this is a transaction involving the transfer of real property it is governed by G.S. 22-2 (the statute of frauds) which reads in pertinent part as follows:

"All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

[1] It is settled law in this jurisdiction that the owner of land may sell this land through an agent and the agent may sign a contract to sell and convey in his own name or in the name of his principal(s). *Lewis v. Allred*, 249 N.C. 486, 106 S.E. 2d 689 (1959). Furthermore, in 12 Am. Jur. 2d, Brokers, § 67, p. 821, it is stated:

"Ordinarily a broker does not act in a dual capacity as the representative of both sides to a negotiation, but only as the agent of the party who first employed him. Once a deal is concluded, however, the law permits him to act as the representative of both parties *if they assent thereto*, for the purpose of signing a memorandum sufficient to take the transaction out of the statute of frauds." (Emphasis added.)

[2] In the present case plaintiff does not contend that the defendant signed a contract or memorandum to sell her property to plaintiff. However, plaintiff does contend that Frank B. Cook in writing the letter of 27 January 1973 was acting as agent for both parties and that this letter supplies the necessary writ-

Hayman v. Ross

ing required by G.S. 22-2. We do not agree. This letter is as follows:

"EXHIBIT C—LETTER FROM FRANK B. COOK dated
January 27, 1973
Mrs. Mary Norton Ross
5414 Riviera Drive
Coral Gables, Florida

Re: Shop Sale

Dear Mrs. Ross:

I have received a check from Mr. W. Zack Hayman in the amount of \$2,500.00 (TWO THOUSAND FIVE HUNDRED DOLLARS) to be deposited in my Trust Account and held as a binder on the sale of your Highlands Dress Shop, Building, Contents and Good Will excepting such personal items as agreed to by you and Mr. Hayman. The sale to include Lots 201-303-205 and 207 as shown by a plat drawn by Charlie McDowell, Land Surveyor, dated March 11, 1968. Seller to pay closing cost. 1973 Real Estate Taxes to be prorated as of date of closing.

It being agreed and understood that the sale price is \$60,000.00 (SIXTY THOUSAND DOLLARS) purchaser to assume the outstanding mortgage or Deed of Trust in the amount of \$9,800.00, (Nine Thousand Eight Hundred Dollars) leaving a balance of \$50,200.00 (FIFTY THOUSAND TWO HUNDRED DOLLARS) to be paid in cash at Closing around February 16, 1973. The sale is subject to a good and merchantable title.

Sincerely yours,
s/ F.B.C.
Frank B. Cook

FBC/p

cc: Mr. W. Z. Hayman
Post Office Box 305
Thomasville, Georgia 31792"

A careful analysis of all of the evidence before us clearly establishes that any agreement between the plaintiff and defend-

State v. Marze

ant with respect to the sale of the property in question was oral and that Cook was acting solely on behalf of the plaintiff and was not authorized (either expressly or impliedly) by the defendant to act on her behalf. Thus, there being no writing sufficient to comply with G.S. 22-2, we are of the opinion that the trial court correctly concluded that the defendant was entitled to judgment as a matter of law.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. TONY EUGENE MARZE AND
DANNY REID ZIEGLER

No. 7420SC458

(Filed 7 August 1974)

**Burglary and Unlawful Breakings § 5— break-in of home and motor vehicle
— sufficiency of evidence**

Evidence was insufficient to be submitted to the jury in a prosecution for breaking and entering and larceny where it tended to show that a home and a motor vehicle were broken into, items were taken therefrom, the items were found buried fifty feet from one defendant's car, defendants were apprehended about two miles from the crime scene after they had been followed by bloodhounds, defendants fled when the law officers approached them, and there was a tennis shoe print on the door of the home entered and one defendant had on tennis shoes when he was apprehended.

APPEAL by defendants from *McConnell, Judge*, 17 December 1973 Session of UNION County Superior Court.

The defendants were charged in bills of indictment with the felonies of breaking and entering a dwelling house with intent to commit larceny, larceny as a result of said breaking and entering, and breaking and entering a motor vehicle with intent to commit larceny. These cases were heard at the 22 October 1973 Session of Union County Superior Court, but the jury deadlocked and failed to return verdicts. A mistrial was declared, and the matter was docketed for the 17 December 1973 Session of Union County Superior Court. Pleas of not guilty were entered in each matter. Each defendant was found guilty as

State v. Marze

charged, and each received an active sentence of five years. From the imposition of said sentences, each defendant appealed.

The State's evidence showed that Ronald Holcomb and his family lived at Route 1, Waxhaw. They left their home on the morning of 17 May 1973, and the home was securely locked when they left. A pickup truck and camper owned by the Holcombs was also located on the premises. It was likewise locked when the Holcombs left home. Various items of personal property were in the pickup truck and in the house. Holcomb returned home that afternoon and found that his home had been entered. Two wrist watches were missing. Also, it was discovered that the camper had been entered and that some fishing tackle had been stolen from the camper. An automobile owned by the defendant Marze was found on the road some four hundred yards from the Holcomb home. The stolen fishing tackle was found in the woods about fifty feet from the Marze automobile. No identifiable fingerprints were found in the Holcomb house, but a tennis shoe print was found on the door. Bloodhounds were brought into the area and were put on a trail which started around three hundred feet from the house. After a search of the area, the defendants were apprehended in the woods about two miles from the Holcomb house. They fled when the officers approached them. The defendant Ziegler was wearing tennis shoes.

The defendants' evidence tended to show that the defendants intended to go fishing. They drove their car to a rural area in Union County and parked beside the road. They set out on foot into a pasture to a pond where they began searching for lizards. After being there some while, they saw a police vehicle near their automobile. Since defendants were in violation of conditions of parole, they fled when they saw the law enforcement officers. They were subsequently apprehended after the dogs led the officers to the place where they were hiding in some bushes. Each defendant denied going about the Holcomb premises or committing any of the offenses charged.

Attorney General Robert Morgan, by Associate Attorney Charles R. Hassell, Jr., for the State.

Wardlow, Knox and Knox, by John S. Freeman and H. Edward Knox for the defendant.

State v. Marze

CARSON, Judge.

Able counsel for the defendant vigorously contends that a judgment as of nonsuit should have been entered at the conclusion of the State's evidence and again at the conclusion of all the evidence. On a motion for nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of any reasonable inferences which arise therefrom. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Bronson*, 10 N.C. App. 638, 179 S.E. 2d 823 (1971). Applying that test to the facts of the instant situation, it is clear that the evidence is sufficient to sustain a finding that someone broke into the home of the Holcombs and their motor vehicle on the date in question, and stole the items as set forth in the bills of indictment. It is further reasonable to assume that the thieves placed the items in the woods some fifty feet from where the defendant Marze's vehicle was located on the road. We do not feel, however, that there was enough evidence to justify submitting the question of the defendants' guilt to the jury. There is no competent evidence to sustain a finding that the defendants were ever at the Holcomb residence. The fact that a print of a tennis shoe was on the door of the Holcomb home and that the defendant Ziegler was wearing tennis shoes is of no probative value. It has no tendency to identify the defendant as the perpetrator of the crime unless circumstances show that the shoe prints were found at or near the place of the crime, that the shoe prints were made at the time of the crime, and that the shoe prints correspond to shoes worn by the accused. *State v. Pinyatello*, 272 N.C. 312, 158 S.E. 2d 596 (1968); *State v. Palmer*, 230 N.C. 205, 52 S.E. 2d 908 (1949). Neither the second nor the third condition as set forth was met in the instant case. In addition, there was no peculiar identifying characteristic shown between the shoe print on the door and the shoes worn by the defendant Ziegler. There was not even an exact measurement to correspond. This matter, therefore, should not have been considered by the jury.

Neither should the testimony concerning the bloodhounds be given any probative value. To be considered by the jury, it is necessary for the State to show that the dog was put on the trail of the guilty party under such circumstances as to afford substantial assurance that the person trailed was, in fact, the person suspected. *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965); *State v. Norman*, 153 N.C. 591, 68 S.E. 917 (1910).

Peace v. Broadcasting Corp.

Here, the dogs were released at least three to four hundred feet from the Holcomb house. There was no evidence whatsoever that the persons who broke into and robbed the Holcomb home were at the position three to four hundred feet away where the dogs were released.

While the fact of flight may be considered by the jury along with other evidence, standing alone it is insufficient to raise the presumption that the defendant committed the crime in question. *State v. Gaines*, 260 N.C. 228, 132 S.E. 2d 485 (1963); *State v. Swain*, 1 N.C. App. 112, 160 S.E. 2d 94 (1968). This is especially true when the flight occurred at a distance of some two miles from the scene of the crime.

Finally, the location of some of the stolen property in the woods fifty feet from the defendant's parked vehicle is insufficient to place their possession with the defendant. The doctrine of recent possession did not apply. *State v. Glenn*, 251 N.C. 156, 110 S.E. 2d 791 (1959).

Considering all of the evidence in the light most favorable to the State, we do not feel that there was sufficient evidence of guilt for this matter to be submitted to the jury.

Reversed.

Judges PARKER and VAUGHN concur.

EVERETT C. PEACE, JR. v. PEACE BROADCASTING CORPORATION,
JOSEPH M. WHITEHEAD, FLOYD M. FOX, JR., AND CLAUDE S.
WHITEHEAD, JR.

No. 748SC401

(Filed 7 August 1974)

1. Evidence § 28.5; Rules of Civil Procedure § 56— motion for summary judgment — affidavit — hearsay — opinions of law

Trial court should have stricken portions of an affidavit submitted in support of a motion for summary judgment which were based on hearsay and which gave opinions on the law of another state.

2. Evidence § 28.5; Rules of Civil Procedure § 56— motion for summary judgment — unsworn affidavit

An affidavit not sworn to before a notary or someone authorized to administer oaths should not have been considered in passing upon a motion for summary judgment.

Judge BRITT concurs in result.

Peace v. Broadcasting Corp.

APPEAL by plaintiff from *James, Judge*, 6 September 1973 Session of WAYNE County Superior Court.

In April, 1969, the plaintiff and the individual defendants entered into a preincorporation agreement wherein they agreed to form a corporation for the purpose of acquiring a radio station then known as WGOL in Goldsboro, North Carolina. Peace Broadcasting Corporation was formed as a result of this agreement. In 1969, the radio station was purchased and renamed WYNG. Pursuant to the terms of the agreement the plaintiff was the President of the corporation and owned fifty percent of the stock. The individual defendants were the remaining shareholders. The plaintiff and defendants were to be members of the Board of Directors. The purchase price of the radio station was \$160,000.00, part of which was to be paid by the promissory note of the corporation payable to the sellers and endorsed personally by the plaintiff. The corporation also was to execute and deliver a second promissory note in the amount of \$50,000.00 payable to the individual defendants with interest. The shares of common stock of the plaintiff were pledged by him to the defendant Whitehead to secure payment of the second note.

The plaintiff alleged that the defendants failed to cooperate with the corporation and failed to put in funds which they had promised thereby creating financial difficulties for the corporation. The defendants alleged that the plaintiff did not properly operate the station and converted some of the corporate funds to his own use. A confession of judgment was entered against the defendant corporation in Virginia in 1972, and the plaintiff's shares of stock were sold at public sale. Subsequently, the individual defendants requested the Federal Communications Commission to transfer the plaintiff's stock into their name.

The complaint alleges seven claims of relief against the defendants. Claim three seeks to enjoin the individual defendants from transferring the plaintiff's shares of stock on the books of the defendant corporation. Claim number seven requests the appointment of a receiver. The remaining claims seek varying amounts of monetary damages.

On 16 August 1973, the defendants filed a motion for summary judgment on the third claim for relief. An affidavit of the defendant Joseph Whitehead was attached to the motion for summary judgment, along with eighteen separate exhibits and a brief in support of the motion. A response to the motion was

Peace v. Broadcasting Corp.

filed by the plaintiff along with affidavits, exhibits, and a brief in opposition to said motion.

Subsequently, the plaintiff filed a motion for a preliminary injunction and a motion to amend the complaint. Motions in opposition to this were duly filed by the defendants. The court ordered that the motion to amend the second claim for relief be allowed but that the motion to amend the third claim for relief, the motion seeking the injunction, be denied. The plaintiff filed a motion to strike certain portions of the defendants' motion for summary judgment. This motion was likewise denied. The defendants' motion for summary judgment on the third claim for relief was granted, and the plaintiff's prayers for a temporary and permanent injunction were denied. To this the plaintiff excepted and appealed.

Dees, Dees, Smith, Powell and Jarrett by Tommy W. Jarrett and James, Williams, McElroy and Diehl by William K. Diehl, Jr., for plaintiff-appellant.

Freeman and Edwards by George K. Freeman, Jr., for defendant-appellee.

CARSON, Judge.

[1] The plaintiff maintains that the court committed error in denying the motion to strike certain portions of the defendants' motion for summary judgment. The plaintiff filed a response to the motion for summary judgment alleging that there was a disputed issue of material fact and the defendants were consequently not entitled to summary judgment. In addition, the plaintiff moved pursuant to Rules 12(f) and 56(e) of the North Carolina Rules of Civil Procedure to strike certain portions of the affidavit of Joseph M. Whitehead. Rule 56(e) requires that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. A considerable portion of the affidavit was, on its face, based on hearsay evidence and should have been stricken. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970). Furthermore, the affiant gave numerous opinions concerning the law of the Commonwealth of Virginia. There was no stipulation that the affiant was an expert, and absent such a finding by the court,

Howell v. Howell

it was improper to allow him to give opinion evidence. *Lineberger v. Insurance Co.*, 12 N.C. App. 135, 182 S.E. 2d 643 (1971).

[2] Furthermore, the affidavit was not sworn to before a notary or someone authorized to administer oaths. While this was apparently inadvertence on the part of the person preparing the affidavit, letters which are not under oath may not be considered as affidavits. *Ogburn v. Sterchi Brothers Stores, Inc.*, 218 N.C. 507, 11 S.E. 2d 460 (1940); *Short v. City of Greensboro*, 15 N. C. App. 135, 189 S.E. 2d 560 (1972). Since the document itself was not admissible because of the failure to have it notarized, the attachments to it were likewise inadmissible.

If the purported affidavit and its attachments were not to be considered by the trial court, there was insufficient evidence for the court to grant the motion for summary judgment. The deposition of the defendant Joseph M. Whitehead was insufficient by itself to support the summary judgment. *Savings and Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

For these reasons the summary judgment on the third claim for relief must be vacated.

Judgment vacated.

Judge HEDRICK concurs.

Judge BRITT concurs in result.

VIRGINIA DORIS COLLIER HOWELL v. JOHN JAMES HOWELL

No. 746DC327

(Filed 7 August 1974)

1. Divorce and Alimony § 18; Notice § 1— divorce action — transferring ownership of vehicle — notice

Notice was required to be served on the defendant in an action for alimony *pendente lite* and divorce from bed and board before the court could enter an order transferring ownership of a motor vehicle from defendant to plaintiff.

2. Notice § 2; Rules of Civil Procedure § 6— inadequate notice of hearing

Defendant did not receive adequate notice of a hearing on motions that past due alimony *pendente lite* be reduced to judgment and that

Howell v. Howell

counsel fees be allowed for appellate representation of plaintiff where notices mailed to defendant's attorney did not give defendant the five days notice, excluding Saturdays, Sundays and holidays, required by Rule 6(a) and the additional three days notice required by Rule 6(e) when notice is by mail.

3. Notice § 3— waiver of notice

Defendant did not waive the lack of notice of a hearing on motions that past due alimony be reduced to judgment and that counsel fees be allowed for appellate representation of plaintiff when counsel for defendant appeared at the hearing, notified the court that defendant had not received adequate notice, that he was not prepared and that he objected to the hearing, and left the courtroom after making such objection.

APPEAL by defendant from *Gay, Judge*, 24 September 1973 Session of NORTHAMPTON County District Court.

This action was instituted on 26 January 1973, seeking alimony pendente lite, permanent alimony, and a divorce from bed and board. An answer was filed denying the material allegations of the complaint. On 16 February 1973, an order was entered requiring the defendant to pay alimony pendente lite to the plaintiff in the amount of \$75.00 per week, that possession of a 1969 Dodge Charger be turned over to the plaintiff, and that the defendant pay attorney fees to the plaintiff's attorney in the amount of \$200.00. The defendant excepted to the order and appealed to this court which affirmed in an opinion reported at 19 N.C. App. 260.

Two notices and motions were filed by the plaintiff on 21 September 1973. The first notice and motion informed the defendant that the plaintiff would appear in District Court on 27 September 1973, at 2:00 p.m., to petition the court for counsel fees for appellate representation of the plaintiff. The second notice and motion stated that no alimony had been paid pursuant to the previous order and requested that past due alimony in the amount of \$2,325.00, plus attorney fees, be reduced to judgment. Copies of both notices and motions were served on the attorney for the defendant by depositing them in the mail on 21 September. On 24 September, Judge Gay entered an order stating that he had been informed by a member of the sheriff's department that the defendant had told the sheriff that he would cancel the liability insurance on the automobile. Whereupon, Judge Gay entered an order directing the defendant to transfer ownership of the motor vehicle in question to the

Howell v. Howell

plaintiff. This order was entered without any notice to the defendant.

On 27 September, a hearing was held to consider the previous motions filed by the plaintiff and mailed to the defendant on 21 September. Counsel for the defendant made a brief appearance at the hearing and informed Judge Gay that he had not received proper notice, that he had not had time to consult with his client, and that he objected to the hearing being conducted without proper notice. Nevertheless, the hearing was conducted and orders entered based on findings of fact and conclusions of law from the evidence presented at the hearing. The court ordered an attorney fee in the amount of \$750.00 be paid to the plaintiff's attorney for the appellate representation previously before this court, and that alimony payments in the amount of \$2,325.00, plus \$200.00 attorney fees, be reduced to judgment and constitute a lien as any other judgment. To the entering of these two judgments and the judgment of 24 September, granting title of the motor vehicle to the plaintiff, the defendant excepted and appealed.

Johnson, Johnson, and Johnson, by Bruce C. Johnson for plaintiff-appellee.

Howard P. Satsky for defendant-appellant.

CARSON, Judge.

[1] The defendant contends that notice was required to be served upon him before the court could enter the order transferring ownership of the motor vehicle to the plaintiff. Normally, notice of a motion out of term must be given to the opposing party. *Gravel Co. v. Taylor*, 269 N.C. 617, 153 S.E. 2d 19 (1967); *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953). If the moving party is entitled to the relief strictly as a matter of right, such notice is not required. *Collins v. Highway Commission, supra*. However, in the instant case, the moving party was not entitled to ownership of the vehicle as a matter of right. The defendant should have been provided with notice as required by the North Carolina Rules of Civil Procedure in order that he might present what evidence or defense he desired. G.S. 1A-1, Rule 6(a), (d), and (e).

[2] Likewise, the defendant did not receive proper notice of the hearing which was conducted on 27 September. Rule 6(d) of

State v. Ketchie

the Rules of Civil Procedure requires that motions such as this be served on the opposing party not later than five days before the time specified for the hearing. Rule 6(a) of the Rules of Civil Procedure further provides that when the period of time prescribed is less than seven days, intermediate Saturdays, Sundays, and holidays, shall be excluded in the computation. Following this formula, the earliest that the hearing could have been conducted was 28 September. In addition, Rule 6(e) of the Rules of Civil Procedure provides that when service of notice is by mail, three days shall be added to the prescribed period. Consequently, the defendant did not receive adequate notice of the hearing, and the orders entered must be vacated.

[3] While the defendant could have waived the lack of notice and proceeded with the hearing, he certainly did not do so, by implication or otherwise. Rather, he appeared at the hearing, notified the court that he had not received adequate notice, that he was not prepared, and objected to the hearing on the grounds of lack of notice. He did not participate in the hearing but left the courtroom after informing the court of his objection. It was, therefore, erroneous for the trial court to continue the hearing because of the lack of adequate notice, and the orders entered must be vacated.

Orders vacated.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES MICHAEL KETCHIE

No. 7421SC409

(Filed 7 August 1974)

1. Constitutional Law § 31— identity of confidential informant

In a trial for possession of narcotics, the State was not required to reveal the identity of an informant who gave an officer information leading to a warrantless search of defendant's vehicle for narcotics.

2. Searches and Seizures § 1— warrantless search — information from confidential informant — probable cause

An officer had probable cause to search defendant's vehicle for marijuana without a warrant based on information received from a confidential informant, notwithstanding the informant gave the officer no facts or circumstances justifying his claim that the vehicle contained

State v. Ketchie

marijuana, where the informant gave the officer the license number of the vehicle and detailed descriptions of the vehicle and the appearance of defendant.

APPEAL by defendant from *Thornburg, Judge*, 15 October 1973 Session of FORSYTH County Superior Court.

The defendant was charged in two bills of indictment with the felonies of possession of marijuana with intent to distribute and with possession of methylenedioxy amphetamine (MDA), a Schedule I controlled substance. The cases were consolidated for trial, and pleas of not guilty were entered as to each count. The defendant was found guilty of possession of MDA and was found guilty of simple possession of marijuana. The defendant was sentenced to two years as a youthful offender and gave notice of appeal.

Officer M. M. Choate, a member of the Winston-Salem Police Department, testified that on 16 May 1973, he was at Forsyth Tech. He received a telephone call from a reliable informant who informed Officer Choate that marijuana was en route from High Point to Fairchild Industries. He was further informed that the drug would arrive at approximately 7:30 p.m. The drug would be transported in a 1968 Oldsmobile, white over blue convertible, license ADE 269, and that the vehicle would be driven by a white male, approximately twenty-one years of age, who would have long brown hair and a mustache. Officer Choate immediately contacted two other officers and had them meet him at North Liberty Street and Fairchild Drive where a surveillance was set up. Approximately five minutes after the surveillance was started, the white over blue Oldsmobile approached. It was being driven by the defendant, a white male with long brown hair. Officer Choate stopped the vehicle and informed the defendant that he had information that the vehicle was being used to transport marijuana. Two thousand two hundred and forty-six grams of marijuana were found in the car along with several plastic bags containing MDA.

Officer Choate further testified that he had known his informant slightly over a month. He testified that he had had discussions with the informer on numerous occasions and had been furnished reliable information before. No facts were given to Officer Choate by the informer to show how he knew about the presence of the drugs in question. Officer Choate testified that his informer had always been reliable as far as Officer

State v. Ketchie

Choate was concerned, and that to the best of his knowledge the informer had never been convicted of using drugs.

The defendant offered no evidence.

Attorney General Robert Morgan by Assistant Attorney General Ralf F. Haskell for the State.

White and Crumpler by Fred G. Crumpler, Jr., and Michael J. Lewis for the defendant-appellant.

CARSON, Judge.

[1] There was no showing of probable cause for a warrantless arrest or a warrantless search apart from the informer's communication. The first question presented is whether, under these circumstances, the prosecution is still privileged to withhold the identity of the informer.

Able counsel for the defendant strenuously argues that disclosure is necessary to provide the defendant with an opportunity to contest the reasonableness of the search. The general rule in this jurisdiction is that disclosure is not necessarily required, but the circumstances of each case dictate the necessity of nondisclosure or disclosure. *Roviaro v. U.S.*, 353 U.S., 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957); *State v. Boles*, 246 N.C. 83, 97 S.E. 2d 476 (1957). The general benefit to society must be weighed against the possibility of depriving the individual of a substantive defense or a constitutional right. *Roviaro v. U. S.*, *supra*; *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53 (1969). The circumstances of this case are very similar to those in the case of *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed. 2d 62 (1967), decided by the United States Supreme Court in a five to four decision. That case held that disclosure was not required under the circumstances as outlined. Under the particular circumstances of this case, disclosure was not necessary for the defense. *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Johnson*, 13 N.C. App. 323, 185 S.E. 2d 423 (1971).

[2] The other question raised by this appeal is whether the trial court committed error in holding that the officer had probable cause to search the vehicle of the defendant when the officer gave no facts or circumstances from his informer justifying his claim that the contraband items were in the vehicle. The defendant relies on the case of *Spinelli v. U. S.*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969), which held that some under-

State v. Moore

lying factors must be given to justify the probable cause. We feel, however, that the facts in the instant case are more similar to those in the case of *Draper v. U. S.*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327 (1959). In the *Draper* case, a reliable informant notified law enforcement officers that the defendant would be returning to Denver by train and that he was going to bring back three ounces of heroin. A detailed description was given including the clothing he was wearing, the type of bag he would be carrying, and the observation that he walked very fast. Draper was arrested upon his arrival at the train station. The United States Supreme Court pointed out that probable cause dealt with the factual, everyday situations which law enforcement officers must face, rather than technicalities. It further pointed out that the definite description of the defendant, in itself, was sufficient to show that the information was obtained from a reliable source. The *Spinelli* case did not overrule *Draper*, but distinguished it under the circumstances in that case. We hold that the facts of the instant case, with the very detailed description of the motor vehicle, the license number, and the appearance of the defendant, places this case in the category with *Draper* and that the contentions of the defendant must, therefore, be denied.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM SALVATORE MOORE

No. 7410SC361

(Filed 7 August 1974)

Indictment and Warrant § 13— failure of solicitor to furnish bill of particulars — waiver of objection

The solicitor failed to comply with an order that defense counsel be furnished with a bill of particulars setting forth the State's physical evidence, the names, addresses and any signed statements of the State's witnesses, and police reports concerning the case, where the solicitor merely made available to defense counsel police records containing the information required by the order; however, defendant waived objection to the solicitor's failure to furnish the bill of particulars as ordered by failing to make such objection before the jury was impaneled.

State v. Moore

ON *certiorari* to review an order entered by *McKinnon, Judge*, 23 August 1973 Session of WAKE County Superior Court.

The defendant was charged in eight bills of indictment with store breaking, larceny, safecracking, and possession of controlled substances. A plea of not guilty was entered as to each count. The jury returned a verdict of not guilty of safe-cracking, and guilty as charged as to the remaining offenses. From active sentences pronounced thereon totaling seventeen to twenty years, the defendant gave notice of appeal.

On 29 June 1973, the attorney for the defendant filed affidavits in each of the cases petitioning the court to order the solicitor to furnish a bill of particulars. A copy of each affidavit was served on the solicitor. On the same date Judge Hobgood entered an order in each case requiring the solicitor to furnish counsel for the defendant on or before 13 July 1973, a bill of particulars setting forth what physical evidence the State possessed in each case, the names and addresses of all witnesses whom the State intended to use and any signed statements of the witnesses, and a copy of any police reports concerning this case. The solicitor did not furnish the bill of particulars as ordered by the court.

The defendant was duly arraigned and entered a plea of not guilty as to each offense. The jury was selected and impaneled. Thereupon the defendant made a motion to dismiss all charges against him on the grounds that the bills of particulars were not furnished as ordered by Judge Hobgood. The solicitor responded by informing the court that the police records had been made available to the defendant's attorney on several occasions and that the records contained all of the information requested by the defendant. The trial court overruled the defendant's motion to dismiss and proceeded with the trial over defendant's objection. Defendant subsequently objected to the introduction of any evidence which was not contained in the bill of particulars, which, of course, included all evidence since no bill of particulars had been furnished.

Attorney General Robert Morgan by Parks H. Icenhour, Assistant Attorney General, for the State.

John C. Brooks for the defendant-appellant.

State v. Moore

CARSON, Judge.

A motion for a bill of particulars is addressed to the sound discretion of the trial court. *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967); *State v. Westry*, 15 N.C. App. 1, 189 S.E. 2d 618 (1972). The court having ruled that the bill of particulars must be furnished, the solicitor was under a duty to abide by the court order to the same extent that anyone else would have been. His attempt to circumvent the order by allowing the defense attorney to read the police files is not an approved practice. Statements of the solicitor and defense counsel show that the police file was more than thirty pages in length and covered numerous crimes and defendants, some of which were connected with this defendant and some of which were not. There is also a conflict as to whether or not the defendant was surprised at the trial by the production of witnesses whose names were not included in the police report. However, it was not made a part of the record and is, therefore, not before us. The solicitor failed to perform his duties by failing to follow the order of Judge Hobgood to provide the bill of particulars.

This does not, however, require the charges against the defendant to be dismissed at this stage. Had the defendant made his objection known to the trial court before entering a plea and before the impaneling of the jury, undoubtedly the trial court would have granted the defendant a continuance in order that the information may have been obtained. Had the solicitor persisted in refusing to provide the information as ordered by the court, various remedies were available to the defendant, including dismissal of the charges. However, the defendant should not be allowed to acquiesce in the actions of the solicitor by reading the police reports and doing nothing further until such time as jeopardy has attached. It would indeed be a mockery of justice if all the charges against the defendant were dismissed as a result of a trap set by his attorney. The defendant, upon reviewing the police reports proffered by the solicitor, should have objected immediately to such reports as being insufficient compliance with Judge Hobgood's order for a bill of particulars. Such objection could have been made before jeopardy attached and would have been addressed to the discretion of the trial judge. *State v. R. R.*, 149 N.C. 508, 62 S.E. 1088 (1908). Defendant had ample opportunity before jeopardy attached to object to the solicitor's submission of the police reports as compliance with the order. He did not avail himself of that

Falkner v. Almon

opportunity, and we hold, therefore, that he waived his right to object to the failure of the solicitor to furnish the bill of particulars as ordered.

No error.

Judges BRITT and HEDRICK concur.

PEGGY FALKNER v. ROBERT F. ALMON

No. 7419SC452

(Filed 7 August 1974)

1. Malicious Prosecution § 1— want of probable cause

Want of probable cause is a necessary element of malicious prosecution.

2. Malicious Prosecution § 5— want of probable cause — malice

The absence of probable cause is not the equivalent of malice and does not establish malice *per se*, though it is evidence from which malice may be inferred.

3. Malicious Prosecution § 4— probable cause — conviction in district court

In a malicious prosecution action based on a charge of trespass, plaintiff's evidence that she was convicted of trespass in the district court conclusively established the existence of probable cause for that charge absent a showing that such conviction was procured by fraud or other unfair means, notwithstanding the State entered a *nol pros* upon her appeal to superior court.

4. Malicious Prosecution § 13— sufficiency of evidence — judgment n.o.v.

In actions for malicious prosecution based upon warrants for trespass and for larceny of a Christmas tree, plaintiff's evidence made a *prima facie* showing of each element of the two causes of action and the trial court erred in rendering judgments for defendant notwithstanding jury verdicts for the plaintiff.

APPEAL by plaintiff from *Seay, Judge*, 3 December 1973 Session of Superior Court held in CABARRUS County. Argued in the Court of Appeals 15 May 1974.

This is an action for damages for malicious prosecution. Plaintiff alleges four causes of action for malicious prosecution based upon the following incidents: (1) defendant caused a warrant to be issued on 23 January 1971, charging plaintiff with trespass; (2) defendant caused a warrant to be issued on 25

Falkner v. Almon

January 1971, charging plaintiff with using loud and indecent language in a public place; (3) defendant caused a warrant to be issued on 20 July 1971, charging plaintiff with trespass; and (4) defendant caused a warrant to be issued on 24 December 1971, charging plaintiff with the larceny of a Christmas tree.

The charges alleged in each of the warrants arose out of a continuing dispute between the parties concerning the location of the dividing line between their properties.

Plaintiff was unsuccessful in her attempt to offer evidence to support her allegations in her cause of action concerning the issuance of a warrant on 25 January 1971, charging the use of loud and indecent language. There were, therefore, no issues submitted to the jury on that cause of action.

Plaintiff's evidence tends to establish the issuance and service of the warrants alleged in her remaining three causes of action. Her evidence tends to establish the following dispositions of those charges: (1) plaintiff was found guilty in District Court of the charge of trespass contained in the warrant dated 23 January 1971. Upon her appeal to Superior Court, the State entered a nol pros; (2) upon trial of the charge of trespass contained in the warrant dated 20 July 1971, the case was dismissed at the close of the State's evidence; and (3) upon the call for trial of the charge of larceny of a Christmas tree contained in the warrant dated 24 December 1971, the State entered a nol pros.

The jury answered issues favorable to plaintiff and awarded damages in the three causes of action as follows: (1) \$240.00 for the trespass prosecution (warrant dated 23 January 1971); (2) \$240.00 for the trespass prosecution (warrant dated 20 July 1971); and (3) \$500.00 for the larceny prosecution (warrant dated 24 December 1971).

Upon defendant's motion, the trial judge rendered judgment for defendant in each cause of action notwithstanding the verdict.

Plaintiff appealed.

Grant & Grant, by Wesley B. Grant, for plaintiff.

Webster S. Medlin for defendant.

Falkner v. Almon

BROCK, Chief Judge.

To establish a cause of action for malicious prosecution, plaintiff had the burden of proof to show: (1) that defendant instituted or procured the institution of a criminal proceeding against her; (2) that the prosecution of the criminal proceeding against her was without probable cause; (3) that the prosecution was with malice; and (4) that the prosecution was terminated in her favor. *Mooney v. Mull*, 216 N.C. 410, 5 S.E. 2d 122.

[1] Want of probable cause is a necessary element of malicious prosecution. The question or lack of probable cause must be determined in accordance with whether the facts and circumstances within the knowledge of the defendant at the time he instituted the criminal prosecution were sufficient to induce a reasonably prudent man to believe that the plaintiff was guilty of the offense charged. *Bryant v. Murray*, 239 N.C. 18, 79 S.E. 2d 243.

[2] The absence of probable cause is not the equivalent of malice, nor does it establish malice *per se*, though it is evidence from which malice may be inferred. The presence or absence of malice is a question of fact to be determined by the jury. *Mitchem v. Weaving Co.*, 210 N.C. 732, 188 S.E. 329.

[3] Plaintiff's evidence tends to show that she was found guilty in District Court of the trespass charged in the warrant dated 23 January 1971. Upon her appeal to Superior Court, the State entered a nol pros. However, absent a showing that the conviction in District Court was procured by fraud or other unfair means, the conviction conclusively establishes the existence of probable cause, even though plaintiff was acquitted in Superior Court. *Priddy v. Department Store*, 17 N.C. App. 322, 194 S.E. 2d 58. Therefore, it was error to submit issues to the jury upon plaintiff's cause of action for malicious prosecution based upon the warrant issued 23 January 1971, charging trespass. Judgment for defendant, notwithstanding the verdict upon this cause of action, was a proper corrective action and will not be disturbed.

[4] Two of plaintiff's causes of action remain for consideration: (1) the cause of action for malicious prosecution based upon the warrant issued 20 July 1971, charging trespass; and (2) the cause of action for malicious prosecution based upon the warrant issued 24 December 1971, charging larceny of a Christmas tree. Without reviewing the long drawn out and hotly

Falkner v. Almon

disputed evidence of who crossed onto the other's property, who mowed the other's grass or who cursed and yelled at the other, we are of the opinion that plaintiff's evidence was sufficient to make a *prima facie* showing of each element of these two causes of action. It matters not that, from the printed record before us, we might decide the issues differently from the way the jury resolved them. Twelve jurors heard the testimony, observed the demeanor of the witnesses and evaluated the evidence under appropriate instructions from the trial judge. The jury has resolved these closely contested issues in favor of plaintiff and against defendant. In the trial of these two causes of action, we find no error of law.

Plaintiff's complaint numbers the causes of action in the exact reverse order of the dates of the warrants upon which they are based. This disposition, therefore, will read in the reverse order of the numbering in plaintiff's complaint.

1. Judgment for defendant notwithstanding the verdict on plaintiff's "Fourth Cause of Action" (warrant issued 23 January 1971, charging trespass) is affirmed.

2. Dismissal of plaintiff's "Third Cause of Action" (warrant issued 25 January 1971, charging loud and indecent language) is affirmed.

3. Judgment for defendant notwithstanding the verdict on plaintiff's "Second Cause of Action" (warrant issued 20 July 1971, charging trespass) is reversed. The verdict rendered thereon by the jury is reinstated, and the cause is remanded to the Superior Court for entry of judgment in conformity with the verdict in favor of plaintiff for \$240.00.

4. Judgment for defendant notwithstanding the verdict on plaintiff's "First Cause of Action" (warrant issued 24 December 1971, charging larceny of a Christmas tree) is reversed. The verdict rendered thereon by the jury is reinstated, and the cause is remanded to the Superior Court for entry of judgment in conformity with the verdict in favor of plaintiff for \$500.00.

Affirmed in part.

Reversed and remanded in part.

Judges CAMPBELL and BRITT concur.

Fishel and Taylor v. Church

FISHEL AND TAYLOR, ARCHITECTS v. GRIFTON UNITED METH-
ODIST CHURCH, AN UNINCORPORATED RELIGIOUS ASSOCIATION

No. 743SC490

(Filed 7 August 1974)

1. Execution § 16— supplemental proceedings — jurisdiction over church trustees

Order of the court in a proceeding supplemental to execution directing the chairman of the board of trustees of the judgment debtor-church to appear and answer was sufficient to bring the board of trustees before the court and make the board of trustees subject to its jurisdiction.

2. Execution §§ 1, 16; Trusts § 3— church property — passive trust — subject to execution

The trial court in a proceeding supplemental to execution correctly determined that the trustees of the judgment debtor-church hold title to the church property in a passive trust and that the church property is therefore subject to sale under execution against the judgment debtor-church. G.S. 1-315(a) (4).

APPEAL by defendant from *Fountain, Judge*, 25 February 1974 Session of Superior Court held in PITT County.

In February 1973, plaintiff obtained judgment against defendant for \$8,588.48 with interest and costs. The suit arose out of a debt to plaintiff for architectural services. The case has been before this court twice. *See Fishel and Taylor v. Church*, 9 N.C. App. 224, 175 S.E. 2d 785 and 13 N.C. App. 238, 185 S.E. 2d 322.

Execution on the judgment was twice returned unsatisfied. Plaintiff then proceeded under G.S. Chapter 1, Article 31, entitled "Supplemental Proceedings," seeking the appearances and examination of the trustees of the church concerning property held by the trustees for the church. The order was issued, and the Chairman of the Board of Trustees was ordered to appear. The Clerk of Superior Court concluded that the property held by the trustees was not subject to levy. Plaintiff appealed to the Judge of the Superior Court.

On appeal, Judge Fountain heard the case on stipulations and admissions of the parties and the record on appeal from the Clerk.

The evidence included testimony from John Oglesby, chairman of the Board of Trustees, that in dealing with the properties

Fishel and Taylor v. Church

the trustees served in an advisory capacity and could merely make recommendations to the Administrative Board of the church. Oglesby stated "that all the trustees do is simply hold title to the property," and that the trustees did "not have the right to sell the property."

As a witness for defendant, James Sponenberg, Pastor of Grifton United Methodist Church, stated that "[t]he local Trustees simply hold title. That's the extent of their authority . . . They merely hold title, nothing else."

The five deeds conveying the properties in question were also introduced. Each deed indicated that the conveyance was to certain named individuals as trustees for defendant church. Four of the deeds contained habendum clauses substantially similar to the following.

"TO HAVE AND TO HOLD the aforesaid lot or tract of land together with all and singular the rights, members, hereditaments and appurtenances to the same belonging, or anyway incident or appertaining, unto the said parties of the second part, the said trustees and their successors and assigns in fee simple forever. In trust, that said premises shall be used, kept, and maintained as a place of divine worship of the Methodist Ministry and members of the Methodist Church, subject to the Discipline, usage and ministerial appointments of said Church as from time to time authorized and declared by the General Conference and by the Annual Conference within whose bounds the said premises are situated. This provision is solely for the benefit of the grantee, and the grantor reserves no right or interest in the said premises."

The habendum clause of the fifth deed included a similar provision and also specified:

"Whenever it shall become necessary or may be deemed expedient by the proper authorities of the said Church to sell or otherwise dispose of the said bargained premises or any part thereof, they may and are hereby empowered to sell or otherwise dispose of and convey the same by and through the said Trustees and their successors, under and pursuant to the Rules and Regulations of the Discipline of the said Methodist Episcopal Church, South, then and at that time in force duly discharged all limitations, uses and trusts herein imposed; and the grantee or purchaser

Fishel and Taylor v. Church

shall in no event be responsible or liable for the application or reinvestment of the proceeds of such sale.”

The evidence also included excerpts of that portion of the Methodist Discipline relating to church property. The Discipline provides, among other things, that all property be conveyed to the church in trust “subject to the discipline, usage and ministerial appointments of said church as from time to time authorized and declared by the General Conference and by the Annual Conference within whose bounds the said premises are situated.” The trustees required by the Discipline are to be nominated and elected by the church. The Charge Conference of the church is empowered:

“To direct the Board of Trustees with respect to the purchase, sale, mortgage, incumbrance, construction, repairing, remodeling, and maintenance of any and all property of the local church.

To direct the Board of Trustees with respect to the acceptance or rejection of any and all conveyances, grants, gifts, donations, legacies, bequests, or devises, absolute or in trust, for the use and benefit of the local church, and to require the administration of any such trust in accordance with the terms and provisions thereof and of the local law appertaining thereto.

To do any and all things necessary to exercise such other powers and duties relating to the property, real and personal, of the local church concerned as may be committed to it by the Discipline.”

The Discipline also provides:

“Should a trustee of a local church or a director of an incorporated local church refuse to execute properly a legal instrument relating to any property of the church when directed so to do by the Charge Conference and when all legal requirements have been satisfied with reference to such execution, the said Charge Conference may by majority vote declare the trustee’s or director’s membership on the Board of Trustees or Board of Directors vacated.”

Judge Fountain entered an order, in pertinent part, as follows.

“1. That the Judgment Debtor, the Church, under the Disciplines of the Church, has its real property conveyed

Fishel and Taylor v. Church

to a Board of Trustees, of which Mr. John Oglesby of Pitt County is the present Chairman;

2. That the creation of the Board of Trustees and their removal and replacement; the provisions, requirements, limitation, and control of the trust and the trustees are all subject to the Discipline of the United Methodist Church, the cestui que trust, which specifically reserves to itself the right to direct the possession and use of the trust property, and the right to direct and require any desired conveyance of title of the trust property and that the testimony of the Chairman of the Trustees and the Pastor of the Defendant Church was that the Trustees are mere title holders without discretionary powers, but subject to control of the Church.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That those properties of the Defendant Church which have been conveyed to the said Board of Trustees, are held in merged or passive trusts only; are not removed from liability for the debts of the Judgment Debtor and do not constitute a restriction on the Judgment Debtor's right from alienation.

2. That as a result of the Supplementary proceeding, the said Trustees have been brought before the Court and the said Trust properties have been determined by the Court to be subject to execution by the Judgment Creditor; and

IT IS FURTHER ORDERED that the Order of the Clerk be and the same is hereby reversed, and all of the Trust properties or estate held by the said Trustees for the benefit of the Defendant Church, be and the same are hereby made subject to execution by the Plaintiffs as Judgment Creditors, to be applied to the satisfaction of the said Judgment." Defendant church appealed.

R. Mayne Albright for plaintiff appellee.

Wallace, Langley, Barwick & Llewellyn by F. E. Wallace, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first argument, that the trustees have not been brought before the court and that they, as holders of record

Newsome v. Newsome

title are not subject to the jurisdiction of the court, is without merit. The order of the court in the Supplemental Proceeding directing the Chairman to appear and answer was sufficient to bring the Board of Trustees before the court and make the Board of Trustees subject to its jurisdiction. *Cornelius v. Albertson*, 244 N.C. 265, 93 S.E. 2d 147.

[2] Defendant also argues the court erred in its findings of fact and conclusions of law. More specifically, defendant contends that the court erred in finding and concluding that the trustees were mere title holders without discretionary responsibilities, that the trust was passive and that the property was subject to sale under execution against the debtor.

We hold that the court correctly determined that the trust was passive. Among other things, the church has both actual possession and the right of disposal. See *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638; *Patrick v. Beatty*, 202 N.C. 454, 163 S.E. 572.

Where the trust is passive, the property is subject to sale under execution against the judgment debtor. G.S. 1-315 (a) (4).

Affirmed.

Judges MORRIS and BALEY concur.

EMMA S. NEWSOME v. HOLLIS NEWSOME

No. 746DC506

(Filed 7 August 1974)

1. Divorce and Alimony § 18— alimony pendente lite — required findings

While it is not required that the trial judge make findings as to each allegation and evidentiary fact presented in a hearing for alimony *pendente lite*, the judge must make findings from which it can be determined upon appellate review that an award of alimony *pendente lite* is justified and appropriate.

2. Divorce and Alimony § 18— alimony pendente lite — insufficiency of findings

The trial court erred in awarding alimony *pendente lite* and counsel fees to plaintiff wife where the court merely concluded that plaintiff was a dependent spouse and substantially in need of maintenance and support from defendant husband but made no findings as to plain-

Newsome v. Newsome

tiff's needs and expenses, her accustomed standard of living or her present standard of living. G.S. 50-16.3.

APPEAL by defendant from *Blythe*, *District Judge* at the 25 January 1974 Session of HERTFORD County District Court. Heard in the Court of Appeals 19 June 1974.

This is a civil action instituted for alimony pendente lite, permanent alimony and counsel fees. The parties were married on 30 March 1973 but had lived together in New York for three years prior to that date. The plaintiff has a 13-year-old daughter; however, there were no children of the marriage to defendant; and apparently defendant did not adopt plaintiff's child. The plaintiff alleged that on 28 October 1973, after the plaintiff stated that she wanted to go to her mother's to get some food, the defendant ordered the plaintiff to get out of the house. The plaintiff further alleged that on 14 October 1973, the defendant beat her and that as a result she left the house. The defendant was subsequently convicted of assault on a female for the incident. Approximately \$3,000 was furnished by the plaintiff as the down payment on the parties' home which they own as tenants by the entirety. The defendant provides the house payments of \$130 per month. The plaintiff removed from the house all the furniture for which she paid. The defendant has since changed the locks on the house. The plaintiff has been living with her mother, and after 14 October 1973, she obtained a job as a log scaler earning \$100 per week. At the second hearing on the matter, one week after the first hearing, the evidence consisted of the following sentence by plaintiff: "I am not now working because I have no transportation." The plaintiff has apparently retained some \$1,100 as the balance of her retirement pay which she withdrew upon leaving her job in New York. The defendant's income is approximately \$178 per week.

The trial court, based on the above evidence, found as a fact that:

"Plaintiff has no independent source of income with which to presently support herself and her 13 year old daughter and with which to defray household expenses incurred while she is living with her mother.

7. Plaintiff, who has retained an attorney, presently does not have funds available with which to defray the necessary expenses of litigation in this suit."

Newsome v. Newsome

The trial court then issued the following conclusions of law:
“(b) The plaintiff is a dependent spouse, to wit: she presently has no independent source of income and is substantially in need of maintenance and support from her husband.

* * *

(b) Plaintiff is without sufficient means with which to sustain herself and to defray the necessary expenses during the prosecution of her suit.”

The trial court then ordered:

“1. That the defendant turn over the keys to the house to the plaintiff and the plaintiff be allowed to live in the house.

2. That defendant continue to make the \$130.00 house payments.

3. That defendant pay the plaintiff \$20.00 per week.

4. That the defendant pay the plaintiff's attorney, Mr. Carter W. Jones, reasonable attorney fees in the amount of One Hundred and Fifty.”

From said order defendant appealed.

Jones, Jones and Jones, by C. Roland Krueger, for plaintiff appellee.

Revelle, Burleson and Lee, by L. Frank Burleson, Jr., for defendant appellant.

MORRIS, Judge.

The defendant contends that it was error for the trial court to award alimony pendente lite and counsel fees in that there were insufficient findings of fact to support the award.

[1] In a hearing for alimony pendente lite, while it is not required that the trial judge make findings as to each allegation and evidentiary fact presented, it is necessary for the trial judge to make findings from which it can be determined upon appellate review that an award of alimony pendente lite is justified and appropriate in the case. G.S. 50-16.8(f); *Sprinkle v. Sprinkle*, 17 N.C. App. 175, 193 S.E. 2d 468 (1972).

Newsome v. Newsome

G.S. 50-16.3 provides that alimony pendente lite may be granted when:

"(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and

(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

In determining the amount of alimony pendente lite, G.S. 50-16.5(a) provides:

"(a) Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case."

Furthermore, case law dictates that the trial court should take into consideration all the circumstances of the parties, including the property, earnings, earning capacity, financial needs and accustomed standard of living of the parties. *Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E. 2d 915 (1970); *Sprinkle v. Sprinkle*, *supra*; *Sgueros v. Sgueros*, 252 N.C. 408, 114 S.E. 2d 79 (1960); 3 Strong, N. C. Index 2d, Divorce and Alimony, § 18, p. 355.

[2] Although the trial court concluded as a matter of law that the plaintiff was a "dependent spouse" and that she was "substantially in need of maintenance and support from her husband", there were no findings of fact, other than the findings that plaintiff was no longer working and that she had no other source of income, which would support these conclusions. There were no findings of fact as to plaintiff's needs and expenses, her accustomed standard of living, or her present standard of living. While it is not necessary in awarding alimony pendente lite on the basis of dependency for the trial judge to find that the wife would be unable to exist without support, it is necessary that the trial judge find facts which establish that she is substantially in need of maintenance and support. See *Peeler v. Peeler*, *supra*; *Cannon v. Cannon*, 14 N.C. App. 716, 189 S.E. 2d 538 (1972); *Sprinkle v. Sprinkle*, *supra*.

The remedy of alimony pendente lite and counsel fees, established for the subsistence of the dependent spouse pending

Beck v. Beck

final determination of the issues, is intended to enable her to maintain herself according to her station in life and to have sufficient funds to employ adequate counsel to meet her husband at the trial upon substantially equal terms. *Myers v. Myers*, 270 N.C. 263, 154 S.E. 2d 84 (1967); *Fogartie v. Fogartie*, 236 N.C. 188, 72 S.E. 2d 226 (1952); *Sprinkle v. Sprinkle*, *supra*. While the remedy is of noble intent, it should only be granted upon a finding of need. In the case at bar, the findings of fact were insufficient to support the conclusions of law that plaintiff was a dependent spouse, and that she was substantially in need of maintenance and support.

We, therefore, hold that it was error for the trial court to make an award of alimony pendente lite and to award to the plaintiff possession of the home.

Since the findings of fact are insufficient to support an award for alimony pendente lite, they are likewise insufficient to support an award of counsel fees. *Sprinkle v. Sprinkle*, *supra*.

The judgment below is vacated, and this cause remanded for rehearing on plaintiff-wife's application for alimony pendente lite and counsel fees.

Reversed and remanded.

Judges BRITT and BAILEY concur.

RAY C. BECK v. CHERYL C. BECK

No. 743DC269

(Filed 7 August 1974)

1. Infants § 9— child custody hearing — hearsay — harmless error

In a child custody proceeding, the admission of testimony as to what one of the minor children told the witness concerning an accident one of the children had had, if erroneous, was not prejudicial when considered in context and with the other evidence presented by the parties.

2. Infants § 9— child custody hearing — opinion of social worker

The trial court in a child custody proceeding did not err in allowing a county social worker to give his opinion as to the living conditions of the children based on a visit to the home for some two hours.

Beck v. Beck

3. Infants § 9—award of custody to father

The trial court did not err in awarding custody of minor children to their father rather than to their mother.

APPEAL by defendant from *Whedbee, District Court Judge*, 6 August 1973 term of CRAVEN County District Court.

The plaintiff husband and defendant wife were married to each other in 1960, and five minor children were born of marriage. The children ranged in age from 3 to 12 years at the time of the institution of this action.

On 7 December 1972, the plaintiff filed this action seeking temporary and permanent custody of the children and seeking a temporary restraining order. On 18 December 1972, temporary custody of the children was awarded to the plaintiff, and a preliminary restraining order was entered granting possession of the home to the plaintiff and forbidding the defendant to come on the premises except to visit the children.

A custody hearing was held at the 6 August 1973 term of Craven County District Court. The plaintiff was awarded custody of the children and the defendant was restrained from going about the premises except for visitation purposes as set out in the order. The defendant gave notice of appeal.

Beaman, Kellum and Mills by Norman B. Kellum, Jr., for plaintiff-appellee.

D. S. Henderson and B. H. Baxter, Jr., for defendant-appellant.

CARSON, Judge.

Briefly stated, the plaintiff's evidence tended to show that the defendant was very unstable, that she had temporarily abandoned the children, that she had engaged in an adulterous relationship with a neighbor, and that the best interest of the minor children would be served by awarding their custody to the plaintiff. The defendant's evidence tended to show that the plaintiff kept unusual working hours, that he used alcoholic beverages to excess, that he engaged in an adulterous relationship after the separation of the parties, and that the best interest of the children would be served by awarding their custody to her. Various witnesses were presented by each party to substantiate their respective claims.

Beck v. Beck

[1] The defendant first objects to the allowance of a witness to relate to the court what one of the minor children had told her concerning an accident that one of the children had had. The court allowed the statement into evidence, stating that he intended to talk to the children and it would be admissible for corroborative purposes, the parties having stipulated that the court could speak to the children privately in chambers. Assuming, arguendo, that the trial court was incorrect in its ruling, it does not follow that this would be grounds for a new trial. To justify a new trial the error must be prejudicial. *Board of Education v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970); *Johnson v. Massengill*, 12 N.C. App. 6, 182 S.E. 2d 232 (1971). Clearly, this matter was not prejudicial when considered in context and with the voluminous amount of other evidence presented by each party. This assignment of error is without merit.

[2] The defendant next objects to allowing a social worker for the Craven County Department of Social Services to testify concerning his visit to the home of the children. The defendant contends that since the witness only visited the home on one occasion and stayed less than two hours, this testimony should not have been allowed. This assignment of error is likewise without merit. The witness spent nearly two hours in the home of the plaintiff and children, and his opinion as to the living conditions of the children was based on sufficient personal observation and thus competent. *Cogdill v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *State v. Brodie*, 190 N.C. 554, 130 S.E. 205 (1925).

[3] The defendant contends that the trial court abused its discretion in awarding custody of the minor children to the plaintiff. As in many cases of this nature, there was a sharp conflict of evidence as to the contentions of the parties. Each party vigorously maintained that he was the proper person to have custody of the minor children. Our cases have long recognized that the trial judge is in the best position to resolve these conflicts of evidence and that the decision of the trial court will not be reviewed in an absence of abuse of discretion. *In re Cox*, 17 N.C. App. 687, 195 S.E. 2d 132 (1973); *In re Custody of Pitts*, 2 N.C. App. 211, 162 S.E. 2d 524 (1968). From an examination of the 299 pages of the written record, it is abundantly clear to us that the trial court patiently and carefully considered all of the evidence presented in this matter. The judgment was based on the evidence presented, and we are unable to find an

Dept. of Social Services v. Roberts

abuse of discretion. The defendant received a fair trial, free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER v. JIMMY ALFRED ROBERTS AND VERNA MARIE ROBERTS (IN THE MATTER OF: VICKIE MARIE ROBERTS, AGE 10, MICKEY ALFRED ROBERTS, AGE 7, NICKI A. ROBERTS, AGE 4, RICKI R. ROBERTS, AGE 1), RESPONDENTS

No. 7421DC359

(Filed 7 August 1974)

1. Appeal and Error § 49— exclusion of evidence — failure to place evidence in record

The exclusion of evidence will not be reviewed on appeal where the record fails to show what the purport of such evidence would have been.

2. Parent and Child § 1— hearing to terminate parental rights — failure to hear all the evidence

In a hearing on a motion to terminate parental rights, the trial court is not required to consider all the evidence which the petitioner might desire to present if the court has satisfied itself that it will not exercise its discretion to terminate the parental rights.

APPEAL by petitioner from *Alexander, Judge*, 5 November 1973 Session of FORSYTH County District Court.

On 8 May 1972, a petition was filed by the Forsyth County Department of Social Services seeking custody of the four minor children of the respondents, ranging in age from two to nine years. The petition alleged that the children were neglected children as defined by G.S. 7A-278(4) in that they did not receive proper care from their parents. On 18 May 1972, an order was entered making the minor children wards of the court and giving legal and physical custody to the Forsyth County Department of Social Services, authorizing them to place the children in suitable foster homes.

On 17 January 1973, the respondents Jimmy and Verna Roberts filed a petition stating that their circumstances had

Dept. of Social Services v. Roberts

changed since 1972 so that they are now capable of taking care of their children in a satisfactory manner, and seeking the return of the children to them. On 27 February 1973, an order was entered allowing the respondents to have visitation with their children, finding as a fact the conditions of the respondents had changed drastically for the better, but delaying a decision until the end of the 1972-1973 school year as to whether custody of the children should be returned to respondents.

On 16 August 1973, the petitioner, Forsyth County Department of Social Services, filed a motion seeking to terminate the parental rights as to the minor children. It alleged that the conditions of the respondents had deteriorated to such an extent that it was no longer in the best interest of the children to return them to their parents. A denial was filed by the respondents, and the matter was set for hearing.

At the hearing, the attorney for the petitioner stated to the court that he had fourteen witnesses to present evidence in this matter. During the testimony of the third witness, the court stated to attorney for petitioner that he would not re-examine matters occurring prior to the previous order of 27 February 1973.

At the conclusion of the hearing, the court entered an order denying the motion to terminate the parental rights of the parents. This order had the effect of leaving the custody of the children with the petitioner. The petitioner gave notice of appeal.

Chester C. Davis for petitioner-appellant.

Bertram Ervin Brown II for respondent-appellee.

CARSON, Judge.

[1] The appellant first contends that the trial court committed error by not allowing evidence to be presented as to events occurring prior to the order of 27 February 1973. The petitioner has failed to place in the record what this testimony would have shown had it been allowed by the trial court. Since the record does not show what the purport of the evidence would have been, the propriety of its exclusion will not be reviewed on appeal. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745 (1955; *Spinella v. Pearce*, 12 N.C. App. 121, 182 S.E. 2d 620 (1971); 1 Stansbury's N. C. Evidence, § 26 (Brandis Rev. 1973).

Craver v. Insurance Co.

The petitioner next contends that the trial court committed error in dismissing the motion after hearing only two, and a portion of the testimony of a third, witnesses. This assignment of error is likewise without merit for the same reasons as set forth in the preceding paragraph. The petitioner did not place or attempt to place in the record the purport of the excluded testimony. We are thus unable on appeal to determine its effect.

We further note that the section under which the petitioner was proceeding, G.S. 7A-288, reads as follows:

Termination of parental rights.—In cases where the court has adjudicated a child to be neglected or dependent, the court *shall have authority* to enter an order which terminates the parental rights with respect to such child if the court finds any one of the following
(emphasis added).

[2] It should be noted that the court is not required to terminate parental rights under any circumstances. G.S. 7A-288 only gives the court the authority to do so in the exercise of its discretion. It would be an exercise in futility for us to require the trial court to consider all evidence which the petitioner might desire to present, if the court has satisfied itself that it will not exercise its discretion to terminate the parental rights.

No error.

Judges BRITT and HEDRICK concur.

ALTON B. CRAVER, JR. v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 7426DC516

(Filed 7 August 1974)

1. Appeal and Error § 49— exclusion of testimony not shown in record

The exclusion of testimony cannot be held prejudicial error where the record fails to show what the excluded testimony would have been had it been admitted in evidence.

2. Evidence § 31— best evidence rule — amendment of document

The best evidence rule does not require that when a document which is an amendment of an earlier document is admitted into evi-

Craver v. Insurance Co.

dence, the earlier document must be admitted at the same time as the amendment.

3. Appeal and Error § 52— instructions agreed to by counsel—invited error

An attorney should not be allowed to participate in the drafting of an instruction, state to the court that it is acceptable to him, and then argue on appeal that the instruction which he helped to draft was erroneous.

APPEAL by plaintiff from *Griffin, Judge*, 28 January 1974 Session of District Court held in MECKLENBURG County.

Heard in Court of Appeals 13 June 1974.

This is an action to recover benefits under an insurance contract. Plaintiff alleged in his complaint that on 4 May 1969 he purchased a medical insurance policy from defendant. Under the terms of this policy defendant was required to compensate plaintiff for medical expenses incurred as a result of an accidental bodily injury. Plaintiff contended that on 12 July 1969 he accidentally fell off a ramp while pushing a wheelbarrow full of mortar and suffered a ruptured disc in his back.

Defendant denied that plaintiff's back injury was the result of an accident, and contended that plaintiff suffered the injury while attempting to move heavy furniture in his home on the night of 12 July 1969.

The case was tried in the District Court of Mecklenburg County, and the jury returned a verdict in favor of defendant. From judgment entered in accordance with the verdict, plaintiff appealed to this Court.

Olive, Howard, Downer, Williams & Price, by Carl W. Howard, for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman, by Wayne Paul Huckel for defendant appellee.

BALEY, Judge.

[1] The only witness for defendant at the trial was Dr. J. J. Priester. While cross-examining Dr. Priester, counsel for plaintiff asked him certain questions concerning the pain resulting from a ruptured disc and the time when such pain would first be felt. The court sustained defendant's objections to two of these questions, and two of plaintiff's assignments of error are

Craver v. Insurance Co.

based on these rulings. However, plaintiff has not placed in the record the answers that Dr. Priester would have given to these questions. It is therefore impossible to determine whether the trial court committed prejudicial error in excluding the two questions, and accordingly these assignments of error may not be considered by this Court. *Electro Lift v. Equipment Co.*, 270 N.C. 433, 154 S.E. 2d 465; *Construction Co. v. Hamlett*, 14 N.C. App. 57, 187 S.E. 2d 438, cert. denied, 281 N.C. 621, 191 S.E. 2d 758; *Sanders v. Anchor Co.*, 12 N.C. App. 362, 183 S.E. 2d 312.

[2] Defendant introduced into evidence a document entitled "Application for Health Insurance," signed by plaintiff and dated 17 October 1969. In answer to one of the questions in this application, defendant stated that he had never had any "bone, joint or back disorder." Defendant's reason for introducing this document was to cast doubt upon plaintiff's credibility, since plaintiff had previously testified that he suffered a ruptured disc on 12 July 1969. Plaintiff contends that this "Application" was an amendment to an earlier insurance application, designed to correct his mistake in inadvertently specifying \$35 rather than \$50 on the earlier application as the amount of daily room and board benefits he desired to receive in the event of hospitalization. He asserts that under the "best evidence rule," the court could not admit this document into evidence without also admitting the earlier application. This assignment of error is based on a misunderstanding of the best evidence rule. The best evidence rule does not require that when a document which is an amendment of an earlier document is admitted into evidence, the earlier document must be admitted at the same time as the amendment. It provides instead that when a party seeks to prove the contents or terms of a writing, he must introduce the original writing into evidence, rather than using a copy or oral evidence as to the terms of the writing. 2 Stansbury, N. C. Evidence (Brandis rev.), § 190; *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768; *Aviation, Inc. v. Insurance Co.*, 19 N.C. App. 557, 199 S.E. 2d 485. Defendant does not contend that the trial court erred in failing to require defendant to introduce the original, rather than a copy, of the "Application for Health Insurance." This assignment of error, therefore, is untenable.

[3] Before the trial judge gave his charge to the jury, the attorneys for both parties conferred with him at the bench. Counsel for defendant submitted a requested instruction explain-

State v. Mitchell

ing what circumstances would, and what circumstances would not, constitute an "accident" within the meaning of plaintiff's insurance policy. This requested instruction was not acceptable to plaintiff, and the attorneys discussed possible revisions in the wording of the instruction. They finally reached agreement on a charge on this subject, and the revised instruction was submitted to the court, with both attorneys stating that it was satisfactory to them as revised. The judge included the revised instruction verbatim in his charge to the jury. Plaintiff now contends that this instruction was erroneous. Such a contention cannot be accepted by this Court. An attorney should not be allowed to participate in the drafting of an instruction, state to the court that it is acceptable to him, and then argue on appeal that the instruction which he helped to draft was erroneous. When the attorneys submitted the agreed instruction to the court, in effect they jointly requested that it be included in the court's charge. The courts of North Carolina have often held that a party may not assign as error an instruction given by the court at his request. *Overton v. Overton*, 260 N.C. 139, 132 S.E. 2d 349; *Chappell v. Dean*, 258 N.C. 412, 128 S.E. 2d 830.

Plaintiff has not shown that any error was committed in the trial of this case, and, accordingly, the verdict of the jury will not be disturbed.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. ADA MITCHELL AND JEWEL
HENRY MITCHELL

No. 736SC506

(Filed 7 August 1974)

**Criminal Law § 142; Searches and Seizures § 2— suspended sentence—
consent to warrantless search—unannounced break-in by officers**

A condition of suspended sentences by which defendants gave consent to a search of their premises for illegal liquor at reasonable hours without a search warrant is valid; however, by agreeing to such condition defendants did not agree that officers might make an unannounced break-in through a locked door, and evidence gained by such a search was not admissible in a trial of defendants for unlawful possession of nontaxpaid liquor.

State v. Mitchell

APPEAL by defendants from *Lanier, Judge*, 19 February 1973 Session of Superior Court held in HERTFORD County.

This is an appeal from judgments imposing suspended sentences entered on verdicts finding defendants guilty of unlawful possession of nontaxpaid liquor, a violation of G.S. 18A-6.

Attorney General Robert Morgan by Associate Attorney E. Thomas Maddox, Jr. for the State.

Jones, Jones & Jones by Carter W. Jones and L. Herbin, Jr. for defendant appellants.

PARKER, Judge.

A Hertford County ABC enforcement officer and an Ahoskie City policeman testified to searching defendants' residence and finding nontaxpaid liquor therein. This evidence was sufficient to require submission of the cases to the jury and defendants' motions for nonsuit were properly denied. The question presented by this appeal is the validity of the search and the admissibility in evidence of its results.

Evidence presented at the voir dire hearing held to determine validity of the search was not in dispute. At approximately 10:30 a.m. on 4 November 1972 the officers went to defendants' residence. They did not have a search warrant. Without knocking or otherwise announcing their presence, they forced open a locked storm door which led into the kitchen at the rear of the dwelling. They immediately entered and commenced the search. Present in the house at the time were the two defendants, an older lady, and a young boy. The officers believed their entry into the house and the warrantless search were justified by the terms of suspended sentences which had previously been imposed on the defendants. By identically worded judgments entered in the district court on 18 May 1972, each defendant had been found guilty of a misdemeanor violation of North Carolina liquor laws and given a six-month prison sentence, suspended upon condition that each defendant pay a \$25.00 fine and costs and not violate the prohibition laws, either state or federal, for a period of two years. Each judgment then contained the following: "[T]he defendant in open court agrees that any lawful officer of Hertford County be allowed to conduct a search of [defendant's] premises at a reasonable hour without a search warrant for the purpose of searching for illegal liquor."

State v. Mitchell

At the conclusion of the voir dire hearing the trial court found that the officers entered the house of the defendants by virtue of the provisions of the prior judgments "wherein the defendants consented for their residence to be searched without a search warrant," and therefore found "that the search was legal in all respects, and it is in evidence that the witness entered the residence of the defendants through the back door, the back storm door, which was locked at the time." On these findings the court overruled defendants' objections and allowed the officers to testify before the jury concerning the search and what they found thereby.

We find valid the conditions of the prior suspended sentences by which defendants gave consent to search of their premises at reasonable hours without a search warrant. G.S. 15-199 recognizes a wide variety of conditions which may be imposed upon suspension of sentence, many of which touch upon and curtail rights guaranteed by State and Federal Constitutions. Rights guaranteed by the Fourth Amendment may be waived, *Zap v. United States*, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946), and the voluntary consent to a warrantless search of one's premises will render competent evidence obtained by the search. *State v. Little*, 270 N.C. 234, 154 S.E. 2d 61. We see no sound reason why such waiver and consent may not effectively be given by agreeing thereto as one of the conditions of a suspended sentence. This should especially be true where, as here, such a condition is clearly designed to facilitate the State's supervision of the probationer's rehabilitation.

This is not to say, however, that the search in the present case was valid. By agreeing that the officers might "conduct a lawful search of [their] premises at a reasonable hour without a search warrant," defendants did not simultaneously waive their right to insist that the search be conducted in an otherwise lawful manner. Specifically, they did not agree that the officers might make an unannounced break-in through a locked door. Our Supreme Court has cautioned that even though police officers have a valid search or arrest warrant, ordinarily they may not enter a private home unless they first give notice of their authority and purpose and make a demand for entry. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897. This requirement is made as much for the protection of the officers as for the protection of the occupants and their constitutional rights. *State v. Covington*, 273 N.C. 690, 161 S.E. 2d 140. The all too frequently

State v. Whitley

tragic consequences of no-knock entries have been well documented in recent years.

Here, nothing in the prior judgments gave the officers the right to break unannounced into defendants' home. They should have first announced their presence and requested entry. Had entry been refused, defendants as probationers could have been cited for violation of the terms of their probation, G.S. 15-200, and upon a finding that the conditions had been violated, the previously suspended sentences could have been put into effect.

The method of entry chosen by the officers rendered their search illegal, and the evidence obtained was not competent at defendants' trial. G.S. 15-27(a). For error in overruling their objections to this evidence, defendants are entitled to a

New trial.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. WADE WHITLEY

No. 747SC476

(Filed 7 August 1974)

Criminal Law § 114— expression of opinion in charge

In a second degree murder prosecution, the trial judge expressed an opinion in violation of G.S. 1-180 when he instructed the jury, "I have no opinion as to whether you should find the defendant either guilty or not guilty of the three things I told you, one of which you would have to find him guilty of."

APPEAL by defendant from *Webb, Judge*, October 1973 Session of Superior Court held in NASH County. Heard in the Court of Appeals on 19 June 1974.

This is a criminal action wherein the defendant, Wade Whitley, was charged in a bill of indictment, proper in form, with the first degree murder of Wilbur Lee Bray on 8 April 1972. Prior to arraignment the State announced that it would seek a verdict of second degree murder or any lesser included

State v. Whitley

offense. The defendant then entered a plea of not guilty and the State offered evidence tending to establish the following:

On 7 April 1972 Wilbur Lee Bray was admitted to Wilson Memorial Hospital; however, a few hours after his admission Bray left the hospital without the permission of his doctors. That evening defendant came to Bray's house and the two men left the house together and stayed out all night. The next day defendant and Bray were sitting in the kitchen of Bray's house drinking and talking when they became involved in an argument. Defendant told Bray he was leaving and the two men went outside where they started fighting. Bray's daughter testified as follows:

"I was standing on the porch right behind him as Wade was walking toward the car, and all of a sudden he turned around and said, 'What did you say,' like that and he runs up and hit daddy and daddy caught his balance at first and then he hit him again and knocked him down. * * *

* * * Wade jumped on top of him and put his knee on his throat. He picked up a bottle, it was a fifth, liquor bottle that was outside laying in the yard. He just picked that liquor bottle up like this, and before he come down, I turned around and ran back in the house and told mama that they were fighting. When I told mama, her and Cindy and my sister and me all ran back outside where they were fighting. I noticed that the liquor bottle had been broken and it was laying down there on the ground, so that's when mama hit Wade over the head with the brush and pulled him off daddy. * * *"

The rescue squad was called to take defendant to the hospital. Some two or three hours later, Bray was taken to the hospital by the rescue squad, where he died on 10 April 1972.

Dr. Laurin J. Kaasa, a medical expert in the field of pathology, testified that "in my opinion [Bray] expired as a result of extensive brain damage and subdura hemorrhage. This type of injury is related to outside pressure. A blow to the head, has been my experience. These blows are usually from a heavy or flat object or a blow with considerable velocity to it. * * *"

The defendant offered evidence tending to show that on 7 April 1972, the defendant stopped by to see Bray and they drank some whiskey. During defendant's visit Bray fell and hit

State v. Whitley

his head and defendant and Bray's wife took her husband to the hospital. Later that same day, after hearing that Bray had returned from the hospital, the defendant came by Bray's house and the two men drank liquor all night and into the next day.

The defendant was found guilty of voluntary manslaughter and from a judgment imposing a prison sentence of five (5) years, he appealed.

Attorney General Robert Morgan by Assistant Attorney General James E. Magner, Jr., for the State.

Farris, Thomas and Farris by Robert A. Farris for defendant appellant.

HEDRICK, Judge.

At the outset we note that the evidence, when taken in the light most favorable to the State, was sufficient to withstand defendant's motions for nonsuit.

Defendant asserts by his assignment of error number eleven that the trial judge committed prejudicial error in his charge to the jury by expressing an opinion in violation of G.S. 1-180. The specific portion of the charge to which this assignment of error is directed reads as follows:

"(Indeed, I have no opinion as to whether you should find the defendant either guilty or not guilty of the three things I told you, *one of which you would have to find him guilty of*, or whether you should find him not guilty.)" (Emphasis added.)

We agree with defendant's contention.

The trial judge occupies an exalted position and the jurors entertain a deep respect for his opinion. *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966). "As a consequence [of this exalted position], the judge prejudices a party or his cause in the minds of the trial jurors whenever he violates the statute by expressing an adverse opinion on the facts. When this occurs, it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors" *State v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173 (1954).

The trial judge's comment in the instant case that the jury would have to find the defendant guilty of one of the three of-

State v. Sanderson

fenses which he had previously discussed is prejudicial error and is not cured, as suggested in the State's brief, by construing the charge contextually as a whole. For such error, the defendant must be afforded a new trial.

The defendant brings forth and argues several other assignments of error which we will not discuss as they are not likely to recur on a retrial of this case.

New trial.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. BOBBY SANDERSON

No. 747SC454

(Filed 7 August 1974)

Criminal Law § 102— improper remark by solicitor — absence of prejudicial error

In a prosecution for kidnapping and armed robbery, the solicitor's statement in his jury argument that "a person with a bad prior criminal record is just like a snake," while disapproved, did not constitute prejudicial error where the court instructed the jury to disregard such statement.

APPEAL by defendant from *Copeland, Judge*, 12 November 1973 Session of Superior Court held in NASH County. Heard in the Court of Appeals on 18 June 1974.

This is a criminal action wherein the defendant, Bobby Sanderson, was charged in bills of indictment, proper in form, with armed robbery and kidnapping. The defendant entered pleas of not guilty, and the State offered evidence tending to establish the following:

On 1 June 1973 Fonzsey Cockrell, a taxicab driver, received a call to go to a Texaco Station located on Highway 301. Upon arriving at this site, Cockrell picked up the defendant, who threw his suitcase in the backseat and got in the frontseat with the driver. Shortly thereafter, the defendant drew a pistol on the driver and instructed him to return to Highway 301. Subsequently, the driver and defendant changed seats and the defendant became the driver of the taxicab. Not long after making

State v. Sanderson

this switch, the defendant demanded that Cockrell give him his money pouch and defendant took \$11.90 from the pouch. At a point near Rowland, N. C., the defendant obtained some tools and used these to remove signs from the taxicab. After purchasing three dollars worth of gas, Cockrell and defendant again switched, with Cockrell doing the driving. A short time later they were stopped by a police officer who arrested defendant after finding that he had a gun.

The defendant testified that on the day in question he and his half-brother had been drinking and had called a cab to take them to the bus station. When the taxi arrived, the driver (Cockrell) asked if he could have a drink of their liquor. After helping defendant and his half-brother drink a pint of liquor, Cockrell offered to take them to Lumberton. The defendant and his half-brother accepted the invitation and defendant's half-brother rode as far as Sharpsburg. Thereafter Cockrell suggested that they take the signs off the car because he was afraid the taxicab company might be looking for the vehicle. A short time later, the car was stopped by an SBI agent and defendant testified that "[a]fter [Cockrell] found that I was an escapee, he told the SBI agent that I had kidnapped him and robbed him."

Defendant denied kidnapping or robbing the taxicab driver, although he did admit having a gun in his back pocket.

The defendant was found guilty of both kidnapping and armed robbery. From judgments imposing prison sentences of fifteen (15) to twenty (20) years for kidnapping and ten (10) to fifteen (15) years for armed robbery, the sentences to run concurrently, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney Keith L. Jarvis for the State.

Moore, Diedrick & Whitaker by L. G. Diedrick for defendant appellant.

HEDRICK, Judge.

Defendant contends that the trial court erred in denying his motion for a mistrial because of a certain statement made to the jury by the solicitor. The statement which forms the basis

State v. Bennett

of this assignment of error is summarized in the record by defendant's counsel as follows:

"His remark was that a man of good character as the prosecuting witness, and he held his left hand up in the air, way up here, and he said a person with a bad prior criminal record is just like a snake, and he took his right hand and held it down, bringing it down to the ground like that"

Certainly, such statements are not consistent with expected courtroom decorum and are not condoned; however, we do not think that this statement reaches the level of prejudicial error. Furthermore, the trial judge correctly and wisely instructed the jury to disregard this comment.

We have carefully reviewed defendant's other assignment of error and find it to be without merit.

The defendant was afforded a fair trial free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. MELVIN JEROME BENNETT

No. 745SC511

(Filed 7 August 1974)

1. Criminal Law § 98— sequestration of witnesses

The trial court did not abuse its discretion in the denial of defendant's motion to sequester two accomplices who were witnesses for the State, and defendant was not prejudiced by the fact that several witnesses remained in the courtroom after the court subsequently ordered all witnesses removed.

2. Criminal Law § 169— exclusion of testimony not shown in record

The exclusion of testimony cannot be held prejudicial error where the record does not show what the testimony would have been.

APPEAL from *Cohoon, Judge*, 10 December 1973 Session of NEW HANOVER County Superior Court. Heard in the Court of Appeals 19 June 1974.

State v. Bennett

Defendant was indicted along with Ervin Sneed, Jr., and Ronald Holmes for the attempted armed robbery of a store operated by Mrs. Annie Pearl Bennett. Defendant Bennett was tried separately, and prior to the calling of the first witness for the State, counsel for defendant Bennett moved that witnesses Sneed and Holmes be sequestered. The court denied the motion, but allowed a later motion, ruling that *all* witnesses be sequestered. Nevertheless, all witnesses for the State—with the exception of Sneed and Holmes—remained in the courtroom for the remainder of the testimony.

Lieutenant L. P. Hayes of the New Hanover County Sheriff's Department testified that he arrested defendant Bennett, and that he asked defendant whether a certain blue 1966 Chevrolet belonged to him. Bennett responded that it did. Counsel for defendant asked Lieutenant Hayes whether defendant had admitted his guilt after admitting that the car belonged to him. The objection of the State was sustained, and Lieutenant Hayes was not permitted to answer. The record does not reveal what the lieutenant's answer would have been, had he been permitted to answer.

The remaining testimony tended to show that Bennett had picked up Sneed and Holmes to give them a ride to school. He had suggested that they rob Mrs. Bennett's store, and he had provided the gun for the robbery. Bennett drove his cofelons to the scene of the robbery, but said that he would remain in the car—a blue 1966 Chevrolet with a series of spots on the side—since Mrs. Bennett knew him. Sneed and Holmes thereupon entered the store, told Mrs. Bennett “this is a holdup”, and threatened her with the pistol; Mrs. Bennett stated, “I’m not scared of that. I have protection.” She then called her son in the backyard of the store who chased the robbers as they fled to the getaway car.

Joe Bennett, son of Annie Pearl Bennett, testified that he chased the robbers as they left the store in a 1966 Chevrolet with a series of spots on one side. He had not previously known Melvin Bennett, but later, on the day of the robbery, he observed Melvin Bennett in the same car parked in a driveway. At the close of all the evidence, counsel for defendant Bennett moved for a mistrial on the ground that the witnesses had violated the court's order of exclusion. The motion was denied, and the jury returned a verdict of guilty. From judgment imposing a sentence of 25 to 30 years, defendant appealed.

State v. Bennett

Attorney General Morgan, by Assistant Attorney General Cole, for the State.

Thomas I. Benton for defendant appellant.

MORRIS, Judge.

[1] We are unable to sustain defendant's assignment of error to the denial of the motion to sequester witnesses and to the denial of motion for mistrial grounded upon apparent non-compliance with the order to sequester that was ultimately entered. This jurisdiction has long followed the rule that segregation, separation, or exclusion of witnesses is not a matter of right, but of discretion on the part of the trial judge. The exercise of such discretion is reviewable only in cases where the discretion has been abused. *State v. Spencer*, 239 N.C. 604, 80 S.E. 2d 670 (1954). In *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970), the Supreme Court held that the trial court does not abuse its discretion in denial of defendant's motion to sequester witnesses where the record discloses no reason for sequestration. Counsel for defendant stated at trial that he wished to have witnesses Sneed and Holmes sequestered so that they could not confer about the case. We fail to discern, however, that there has been an abuse of discretion or that an adequate reason for sequestration was presented to the court. Nor do we discern prejudice in the fact that several witnesses remained in the courtroom after the court ordered all witnesses removed. It does not appear that counsel made any objection to their presence until the conclusion of the State's rebuttal evidence.

[2] Likewise, we are unable to sustain the assignment of error to the exclusion of a statement allegedly made by defendant to Lieutenant Hayes. The record does not reflect what the answer of Lieutenant Hayes would have been relative to this statement. Thus, we are unable to determine whether defendant has been prejudiced by its exclusion, and this assignment of error is overruled. *State v. Mitchell*, 20 N.C. App. 437, 201 S.E. 2d 720 (1974).

No error.

Judges BRITT and BAILEY concur.

State v. Carver

STATE OF NORTH CAROLINA v. LINDSEY KEESTER CARVER

No. 749SC549

(Filed 7 August 1974)

1. Homicide § 21— voluntary manslaughter — sufficiency of evidence

The State's evidence was sufficient to sustain a verdict of voluntary manslaughter where it tended to show that defendant took a shotgun away from the victim by pointing a handgun at him and then stepped back two or three steps and shot the victim.

2. Criminal Law § 88— cross-examination of defendant

The trial court did not abuse its discretion in allowing the solicitor to ask defendant on cross-examination why he did not subpoena certain witnesses.

3. Criminal Law § 96— objection sustained — failure to instruct jury

Where the court sustained defendant's objection to the solicitor's question concerning a court order prohibiting defendant from carrying a weapon, the court was not required to instruct the jury to disregard the question absent a request for additional instructions.

4. Homicide § 24— instructions — reducing crime to manslaughter — self-defense

In this homicide prosecution, defendant was not prejudiced by the trial court's erroneous instruction that "In order to reduce the crime to manslaughter, the defendant must prove . . . to your satisfaction that he acted in self-defense" where the court thereafter set out the necessary elements to negate malice and reduce the crime to manslaughter and made it clear in other portions of the charge that defendant would not be guilty of any offense if he acted in self-defense.

ON *certiorari* to review trial before *McLelland, Judge*, 22 October 1973 Session of Superior Court held in PERSON County.

Heard in Court of Appeals 20 June 1974.

Defendant was charged in a bill of indictment with the first degree murder of Leon Clay on 17 September 1972. He entered a plea of not guilty but was convicted by the jury of voluntary manslaughter. From judgment imposing a sentence of 12 to 15 years imprisonment, defendant filed notice of appeal. The record was not docketed in apt time, and this Court granted *certiorari* to permit appellate review.

Attorney General Robert Morgan, by Assistant Attorney General George W. Boylan, for the State.

Ramsey, Jackson, Hubbard & Galloway, by Mark Galloway, for defendant appellant.

State v. Carver

BALEY, Judge.

[1] Defendant assigns as error the failure of the trial court to grant his motions for a directed verdict of not guilty, and, after the jury had returned a verdict of guilty of voluntary manslaughter, to set aside that verdict on the ground of insufficient evidence.

The State's evidence included the testimony of four eyewitnesses to the shooting. Two brothers of the deceased, Harold Clay and Roderick Clay, testified that they saw defendant take a shotgun from Leon Clay and then step back and shoot him. Burnell Paylor stated: "I observed Keester Carver walk up to Leon Clay, point a handgun at Clay's head within an inch of his head and take the shotgun from Clay After Carver got the shotgun he walked back two or three steps and shot." Harold Clay and Linda Royster told of previous threats to kill Leon Clay made by the defendant, and Linda testified: "I saw Keester come around the car, point the gun at Leon's head and take the shotgun and then shoot. . . . At the time Keester shot, he was standing two or three steps back from Leon." Admittedly there was a conflicting version of the shooting from defense witnesses, but the State's evidence was clearly sufficient for submission to the jury and to sustain a verdict of voluntary manslaughter.

[2, 3] Defendant contends that the solicitor (District Attorney) was permitted to ask improper questions upon the cross-examination of the defendant, and specifically to inquire why defendant did not subpoena certain witnesses. Control of the cross-examination is largely within the discretion of the trial court, *State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875, *cert. denied*, 397 U.S. 1050, and there was no manifest abuse of such discretion in this case which could be considered to be prejudicial. The court sustained defendant's objection to the solicitor's question concerning a court order prohibiting defendant from carrying a weapon, and defendant complains that the jury was not instructed to disregard the question. No request was made for any additional jury instructions, and the court was not required to take such action in the absence of a specific request. In any event defendant is subject to cross-examination concerning his conviction for crime. *State v. Miller*, 281 N.C. 70, 187 S.E. 2d 729; *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174.

[4] Finally defendant has assigned as error the charge of the court with respect to his right of self-defense. When considered

Brooks v. Boucher

as a whole the charge was full, fair, and impartial, and gave to defendant every consideration to which he was entitled under the law. It instructed the jury that the right to kill in self-defense is based on the necessity, real or apparent, to the defendant to kill to save himself from death or great bodily harm, and explained by reference to the evidence in this case the constituent elements of the right of self-defense. Through an inadvertence the court at one point stated: "In order to reduce the crime to manslaughter, the defendant must prove, not beyond a reasonable doubt, but simply to your satisfaction that he acted in self-defense." This is an obvious error as there would be no crime if defendant proved to the satisfaction of the jury that he acted in self-defense. Immediately after the above *lapsus linguae*, the court proceeded to set out the necessary elements to negate malice and reduce the crime to manslaughter and pointed out "that [if] the defendant acted properly in self-defense, he would not be guilty of any offense." The court made this clear in numerous other references throughout the charge, and the jury could not have been reasonably misled. This inadvertent error was harmless beyond a reasonable doubt. *State v. Bryant*, 283 N.C. 227, 195 S.E. 2d 509; see *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

The facts in this case are in serious dispute, but the jury has accepted the State's version, at least in part, in its verdict of voluntary manslaughter. No prejudicial error has been shown which would justify disturbing this verdict.

No error.

Judges MORRIS and VAUGHN concur.

BRUCE VAN BROOKS v. HARRY K. BOUCHER, ADMINISTRATOR OF THE
ESTATE OF JOHN HENRY DOBBINS

No. 7429SC477

(Filed 7 August 1974)

1. Automobiles § 40— crossing at point other than crosswalk — duties of pedestrian

A pedestrian crossing a street at a point other than a marked or unmarked crosswalk must yield the right-of-way and must con-

Brooks v. Boucher

stantly watch for oncoming traffic before he steps into the street and while he is crossing. G.S. 20-174(a).

2. Automobiles § 83— crossing at point other than crosswalk — contributor negligence of pedestrian

In an action to recover for injuries sustained by a fourteen-year-old pedestrian when he was struck by defendant's car, plaintiff's evidence disclosed that he was contributorily negligent as a matter of law in failing to watch for approaching vehicles and to yield the right of way while crossing the street at a point where there was no marked or unmarked crosswalk.

APPEAL by plaintiff from *Webb, Judge*, 14 January 1974 Session of Superior Court held in RUTHERFORD County.

Heard in Court of Appeals 13 June 1974.

Plaintiff brought this action to recover damages for personal injuries suffered on 16 February 1968 when he was struck by an automobile driven by John Henry Dobbins in the town of Spindale. Dobbins died before the trial of the case, and the administrator of his estate, Harry K. Boucher, was substituted as defendant. The case was tried in the Superior Court of Rutherford County, and at the conclusion of plaintiff's evidence, the court granted a directed verdict in favor of defendant. Plaintiff appealed to this Court.

Hamrick and Hamrick, by J. Nat Hamrick, for plaintiff appellant.

Morris, Golding, Blue & Phillips, by James N. Golding, for defendant appellee.

BALEY, Judge.

When defendant moves for a directed verdict, the evidence must be considered in the light most favorable to the plaintiff. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585; *Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E. 2d 329. Considered in this manner, the evidence in this case tends to show the following: Higgins Cafe is located on the south side of Main Street, which runs east and west in the town of Spindale. Oak Street intersects with Main Street at a point 120 to 145 feet east of Higgins Cafe. On 16 February 1968, plaintiff was fourteen years old. He and a group of other boys went to Spindale about 10:30 p.m. and ate at Higgins Cafe. After they finished their meal about an hour later, they left the cafe and walked or jogged eastward on the south side of Main Street and crossed to the north side. The

Brooks v. Boucher

evidence is somewhat vague as to the exact place of the crossing and ranged, by plaintiff's estimates, between 15 and 75 feet west of the intersection. In the light most favorable to him, plaintiff's evidence is clear that he was crossing at a point which was not within a pedestrian crosswalk, either marked or unmarked. Before starting across the street, plaintiff looked for approaching traffic and did not see any. When he reached the center line of Main Street, plaintiff again looked for oncoming traffic, and he observed Dobbins' car about six or eight feet away, approaching him from the right. Plaintiff did not have time to get out of the path of Dobbins' car, and the car struck him. He "was slung up on the hood of the car and . . . fell off on the pavement," and suffered a broken leg. Dobbins was charged with speeding in excess of 20 miles per hour in a 20-mile zone and pleaded guilty.

[1] Plaintiff's evidence shows that he crossed Main Street just to the west of its intersection with Oak Street, at a point where there was no marked or unmarked crosswalk. Under G.S. 20-174(a), a pedestrian crossing a street at a point other than a marked or unmarked crosswalk must yield the right-of-way. Failure to yield the right-of-way is not negligence per se, *Blake v. Mallard*, 262 N.C. 62, 136 S.E. 2d 214, but it does constitute evidence of negligence. *Blake v. Mallard, supra*; *Anderson v. Mann*, 9 N.C. App. 397, 176 S.E. 2d 365. A pedestrian who crosses the street at a point where he does not have the right-of-way must constantly watch for oncoming traffic before he steps into the street and while he is crossing. *Rosser v. Smith*, 260 N.C. 647, 133 S.E. 2d 499; *Garmon v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589. If he sees a vehicle approaching him, he must move out of its path. *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607; *Price v. Miller*, 271 N.C. 690, 157 S.E. 2d 347. A pedestrian who fails to take these precautions cannot be said to exercise reasonable care for his own safety.

[2] In this case plaintiff testified that he looked for approaching traffic before he began to cross Main Street. But after he started across the street, he did not look for oncoming traffic again until he reached the center line. If he had looked to his right during this interval, he could have seen Dobbins' car and would have had time to get out of its path. Plaintiff's failure to watch for approaching vehicles while crossing the street and to yield the right-of-way constitutes contributory negligence, and this negligence was one of the proximate causes of his injury.

State v. Moore

A fourteen-year-old child may be held contributorily negligent as a matter of law. See *Welch v. Jenkins*, 271 N.C. 138, 155 S.E. 2d 763; *Van Dyke v. Atlantic Greyhound Corp.*, 218 N.C. 283, 10 S.E. 2d 727; *Edwards v. Edwards*, 3 N.C. App. 215, 164 S.E. 2d 383.

The trial court properly granted defendant's motion for a directed verdict, and its judgment is affirmed.

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. EASTER MAE LITTLE MOORE

No. 7418SC515

(Filed 7 August 1974)

Robbery § 4—guilt as aider and abettor

The State's evidence was sufficient to support a jury finding that defendant aided and abetted in the commission of an armed robbery where it tended to show that defendant suggested that two acquaintances rob a service station attended by her friend, furnished the gun used in the robbery, pointed out the service station to the two robbers, was present in the service station during the robbery, refused to identify the robbers and tried to mislead officers by identifying another person.

APPEAL by defendant from *Lupton, Judge*, 26 November 1973 Session of Superior Court held in GUILFORD County.

Heard in Court of Appeals 20 June 1974.

Defendant was tried upon a bill of indictment, proper in form, which charged the robbery with a firearm of Mobil Center, Inc., a service station in Greensboro, North Carolina, on 14 August 1973, and the taking of \$75.54 from Yvonne Franklin, an attendant at the station.

Defendant entered a plea of not guilty but was convicted by a jury and sentenced by the court to a term of ten years imprisonment.

From this judgment she has appealed.

State v. Moore

Attorney General Robert Morgan, by Associate Attorney Charles J. Murray, for the State.

Smith, Carrington, Patterson, Follin & Curtis, by Kenneth M. Carrington, for defendant appellant.

BALEY, Judge.

The sole question presented by this appeal is whether the evidence of the State was sufficient to justify the submission of the case to the jury and to support the verdict reached. Defendant contends that, although she was present at the time of the robbery, there is no evidence that she participated actively or aided and abetted the other participants in the commission of the crime. She argues that there was no evidence that she gave any encouragement to the perpetrators of the crime or let it be known that she was standing by to render assistance.

The State's evidence included the testimony of Yvonne Franklin, the station attendant, William Henry Freeland, one of the perpetrators of the robbery, police officers who investigated the case, and the signed statement of the defendant herself. In defendant's statement she admitted the two persons who robbed the station, Earl Street, and Freeland, came to her home the afternoon of 13 August 1973 needing money, and she told them of the Mobile service station attended by her friend Yvonne Franklin. Street and Freeland returned about midnight and she provided them with a gun and went with them in their car to point out the service station. After they passed the station they let defendant out of the car and she walked to the station and was present when Street and Freeland entered the station, presented the gun, and took the money from the attendant Yvonne. She did not reveal to Yvonne that she knew Street and Freeland and refused to identify them after they were in custody. She pointed out some other person in a Cadillac as looking like one of the robbers. The witness Freeland testified to substantially the same information contained in defendant's statement and added that it was their intent to meet back at the defendant's home after the robbery.

It seems clear that the State's evidence was ample to establish that defendant picked the victim, furnished the weapon, was present during the robbery, refused to identify the robbers, and tried to mislead the officers by identifying another person. She was no innocent bystander, but a planted observer. Defend-

State v. Letterlough

ant was a full participant in the planning of the crime and in its execution. She was present and assisted the other active perpetrators of the robbery.

When two or more persons aid and abet each other in the commission of a crime, all are principals and equally guilty. Strong, N. C. Index 2d, Criminal Law, § 9; *State v. Terry*, 278 N.C. 284, 179 S.E. 2d 368; *State v. McNair*, 272 N.C. 130, 157 S.E. 2d 660.

The motions of defendant for judgment of nonsuit and to set aside the verdict were properly denied.

In this trial, we find no error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. HARVEY LETTERLOUGH

No. 742SC508

(Filed 7 August 1974)

1. Assault and Battery § 14— identification of defendant — sufficiency of evidence

In this prosecution for felonious assault, the State's evidence of identification of defendant as the perpetrator of the crime was sufficient for the jury where the victim testified he was shot by defendant and an officer testified that defendant admitted shooting the victim.

2. Criminal Law § 116— failure of defendant to testify — instruction — absence of request

In the absence of a special request the court is not required to give an instruction concerning defendant's failure to testify.

APPEAL by defendant from *Fountain, Judge*, 4 December 1973 Session of Superior Court held in MARTIN County.

Heard in Court of Appeals 19 June 1974.

In a bill of indictment defendant was charged with a felonious assault upon Sam D. Nelson on 13 August 1972 with a deadly weapon with intent to kill inflicting serious injuries. He entered a plea of not guilty and was tried before a jury.

State v. Letterlough

From a verdict of guilty and judgment imposing a sentence of ten years imprisonment, defendant has appealed to this court.

Attorney General Robert Morgan, by Assistant Attorney General James L. Blackburn, for the State.

Milton E. Moore for defendant appellant.

BALEY, Judge.

[1] Defendant assigns as error the failure of the court to grant his motion for dismissal upon the ground that there was not sufficient evidence of identification of the defendant as the perpetrator of the crime to warrant submission to the jury.

The State's evidence indicated that the defendant and Samuel D. Nelson had an argument during a card game at the home of John Powell, and Nelson cut the defendant with an old hawk bill knife. Both were ordered to leave, and Nelson testified: "I was walking. Going down the road I seen Harvey Letterlough pull out behind me. Someone in the car with him or him one called me 'Sam'. As soon as they said 'Sam', I looked around. About that time he hauled off and shot me."

Officer Jerry V. Beach testified that the defendant told him that "he called to Sam Nelson . . . and when he stopped Sam Nelson turned around and said to him, 'If you come any closer, if you come up here, I am going to cut you again,' and he said that he turned the gun on Sam Nelson shooting him directly in the face. . . . He said . . . he meant to kill Sam Nelson. . . . This is when he said if he had another shell he would have shot him again."

The court after a voir dire hearing determined that the statement made to Officer Beach by the defendant was "made knowingly, freely, and voluntarily," and after an understanding waiver of his constitutional rights.

It seems clear that the State's evidence taken in its most favorable light was sufficient for submission to the jury and to sustain a conviction.

[2] Defendant contends that the court committed error in its charge to the jury by omitting to instruct the jury that the failure of the defendant to testify in his own behalf should not be taken to his prejudice. There was no request by defendant for such instruction.

Brantley v. Meekins

In the absence of a special request the court is not required to give an instruction concerning defendant's failure to testify. *State v. Rankin*, 282 N.C. 572, 193 S.E. 2d 740; *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115, *cert. denied*, 404 U.S. 1023, 30 L.Ed. 2d 673, 92 S.Ct. 699; *State v. Jordan*, 216 N.C. 356, 5 S.E. 2d 156.

In the trial in the Superior Court defendant has shown no prejudicial error.

No error.

Judges BRITT and MORRIS concur.

NORMAN EARL BRANTLEY v. C. S. MEEKINS

No. 741SC481

(Filed 7 August 1974)

1. Appeal and Error § 35— necessity for case on appeal

It is not necessary that a case on appeal be served on the appellee where appellant's only assignment of error relates solely to the record proper.

2. Limitation of Actions § 4; Clerks of Court § 13— action for negligence by clerk of court — statute of limitations

An action against a clerk of superior court based on alleged negligence in the issuance of a summons is governed by the three-year statute of limitations, G.S. 1-52, and the court properly entered summary judgment for defendant clerk where the face of the record proper shows that the action is barred by the statute of limitations.

APPEAL by plaintiff from *James, Judge*, 14 January 1974 Session of Superior Court held in DARE County. Heard in the Court of Appeals on 19 June 1974.

This is a civil action wherein the plaintiff, Norman Earl Brantley, seeks to recover damages from defendant, C. S. Meekins, as a result of the alleged negligence of the latter.

The complaint in the present action was filed on 26 November 1971 and contained the following pertinent allegations:

"III. That on or about November 26, 1962, Plaintiff was severely injured in an automobile accident, that these

Brantley v. Meekins

injuries were sustained as a proximate result of the negligence of Lester Sawyer, and that Plaintiff's automobile was almost totally destroyed.

IV. That Plaintiff had a good cause of action for damages arising out of the above events against Lester Sawyer.

V. That on November 26, 1965, Defendant Meekins in his official capacity as Clerk of Superior Court of Dare County negligently and improperly issued a Summons to Lester Sawyer which ordered him to appear in Pasquotank County, rather than Dare County where Plaintiff's negligence action had been instituted that day.

VI. That this Summons was void and a nullity and failed to create jurisdiction over the Defendant, Lester Sawyer, as a proximate result of which, the Statute of Limitations having run at midnight, November 26, 1965, Plaintiff's action against Lester Sawyer was ultimately dismissed; and Plaintiff was barred from prosecuting his claim against Lester Sawyer on the merits thereof.

VII. That Defendant Meekins knew or, in the exercise of reasonable care, should have known of the defective nature of this Summons, and that he negligently caused it so to issue, and that but for this negligent act Plaintiff would have recovered just compensation in his action against Lester Sawyer in the amount of Twenty-Five Thousand Dollars (\$25,000.00)."

The defendant filed answer in which he denied the material allegations of the complaint and pleaded the statute of limitations in bar of any recovery by the plaintiff.

On 2 January 1974 the defendant moved for summary judgment, and on 17 January 1974 Judge James entered an order granting summary judgment in favor of the defendant. The plaintiff appealed therefrom.

Winston, Coleman, and Bernholz by Steven A. Bernholz and Roger Bernholz for plaintiff appellant.

No counsel contra.

HEDRICK, Judge.

[1] Defendant filed a motion in this Court to dismiss plaintiff's appeal for the reason that the case on appeal was not served on

Brantley v. Meekins

defendant within the time allowed. Plaintiff, in his response to the defendant's motion, does not deny that he failed to timely serve the case on appeal, but contends his only assignment of error relates solely to the record proper.

In *Houck v. Overcash*, 15 N. C. App. 581, 190 S.E. 2d 297 (1972), rev'd. on other grounds, 282 N.C. 623, 193 S.E. 2d 905 (1973), it is stated:

"Where appellant's assignments of error all relate to the record proper it is not necessary that a case on appeal be served on the appellee. *Holsomback v. Holsomback*, 273 N.C. 728, 161 S.E. 2d 99. 'In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate Court will review only the record proper and determine whether errors of law are disclosed on the face thereof.' *Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E. 2d 659."

Thus, defendant's motion to dismiss the appeal is overruled.

[2] A review of the record proper discloses that plaintiff's alleged cause of action against defendant Meekins accrued on 26 November 1965 and that plaintiff's complaint was filed on 26 November 1971. G.S. 1-52 enumerates the types of actions which are subject to a three year statute of limitations and among these is the type of action which is now before us. See G.S. 1-52(5).

Therefore, since it is clear on the face of the record proper that the present action is barred by the three year statute of limitations, we hold that the trial court correctly entered summary judgment in favor of the defendant.

Affirmed.

Judges CAMPBELL and PARKER concur.

House v. House

NONNIE H. HOUSE v. WOODROW W. HOUSE AND LOYD VICTOR BELL, JR.

No. 749SC381

(Filed 7 August 1974)

Process § 16; Rules of Civil Procedure § 4— service of process on non-resident driver — alternate methods

In an action growing out of a motor vehicle accident in this State, service of process may be made on a nonresident driver either by service on the Commissioner of Motor Vehicles pursuant to G.S. 1-105 or by service by registered mail with return receipt requested pursuant to G.S. 1A-1, Rule 4(j) (9).

APPEAL by defendant Bell from *Bone, Judge*, 5 November 1973 Session of FRANKLIN County Superior Court.

This is an action for personal injuries brought by the plaintiff guest passenger against her husband, Woodrow House, the operator of one motor vehicle, and Loyd Victor Bell, Jr., a Virginia resident, the operator of the other vehicle involved in the collision. The collision took place in Guilford County on 28 November 1971. Suit was instituted in Franklin County on 20 March 1972. The defendant Bell received summons and complaint by registered mail, return receipt requested, on 21 March 1972, and signed the receipt on 22 March. No answers or pleadings were filed by the defendant Bell. An affidavit by the attorney for the plaintiff was filed on 26 September 1972, and entry of default was filed 6 October 1972. On 18 October 1972, the defendant Bell made a special appearance and moved to set aside the service of summons. This motion was denied, and the defendant Bell gave notice of appeal.

Hubert H. Senter for plaintiff-appellee.

Teague, Johnson, Patterson, Dilthey and Clay, by I. Edward Johnson for defendant-appellant.

CARSON, Judge.

The defendant contends that G.S. 1-105, which provides for service of process on non-resident drivers of motor vehicles, is exclusive; and an attempt to serve him by mail violates the fourteenth amendment to the Constitution of the United States by depriving him of his property without due process and denies him equal protection of law. The validity of service pursuant to

House v. House

G.S. 1-105, which designates the Commissioner of Motor Vehicles as process agent for non-resident drivers, has been repeatedly upheld and is not challenged here. *Ewing v. Thompson*, 233 N.C. 564, 65 S.E. 2d 17 (1951); *Davis v. Martini*, 233 N.C. 351, 64 S.E. 2d 1 (1951). We do not believe, however, that its validity makes it exclusive. The fundamental requisite of due process is notice and an opportunity to be heard. *Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966). See *Denton v. Ellis*, 258 F. Supp. 223 (EDNC 1966).

Rule 4 (j) (9) of the North Carolina Rules of Civil Procedure provides an alternative method for service on parties that cannot otherwise be served, or that are not inhabitants of, or found within this State. It requires an affidavit to be filed by the attorney for the plaintiff setting forth why such service is necessary. The summons and complaint then must be served by registered mail with return receipt requested. Rule 4(j) (9) is not restricted to any one type of civil case. We do not agree with the defendant's contention that it is not available for accidents involving motor vehicles.

We further note that the General Assembly repealed G.S. 1-105 by the 1967 Session Laws effective 1 January 1970. The 1971 General Assembly reinstated 1-105 effective 1 July 1971. For a period of one and one-half years Rule 4(j) (9) was the only service available for serving out of state motorists. If it was available then, we do not think it was made ineffective by the re-enactment of G.S. 1-105. When G.S. 1-105 was re-enacted, if the General Assembly had wanted to make it exclusive, it could have easily done so. In the absence of such legislative restriction, we hold that either method of service is available to serve a non-resident operator of a motor vehicle under appropriate circumstances.

No error.

Judges PARKER and VAUGHN concur.

State v. Tillman

STATE OF NORTH CAROLINA v. JOHN TILLMAN, JR.

No. 745SC371

(Filed 7 August 1974)

1. Criminal Law § 166— abandonment of assignments of error

Assignment of error not brought forward and argued in the brief is deemed abandoned.

2. Criminal Law §§ 6, 29— mental capacity — intoxication

In this prosecution for felonious breaking and entering wherein defendant testified that he had been drinking wine the day the offense occurred and does not remember committing it, the record does not show on its face that defendant lacked the mental capacity to stand trial, the trial court did not err in failing to recess the trial and order a psychiatric evaluation of defendant absent a request therefor, and the trial court did not err in failing to submit the question of defendant's mental capacity to the jury.

APPEAL by defendant from *Cohoon, Judge*, 10 December 1973 Session of NEW HANOVER County Superior Court.

The defendant was charged in a bill of indictment with the felony of breaking and entering with the intent to commit larceny. A plea of not guilty was entered and a verdict of guilty as charged was returned. From an active sentence of eight years imposed thereon, the defendant gave notice of appeal.

Facts necessary for the determination of this case are set forth in the opinion.

Attorney General Robert Morgan, by Associate Attorney John R. Morgan for the State.

James D. Smith for the defendant-appellant.

CARSON, Judge.

[1] The only assignment of error presented by the defendant in the record on appeal is his allegation that the trial court committed error by instructing the jury as to breaking or entering and emphasizing the "or" since the indictment charged breaking and entering. Apparently, counsel for defendant has realized that this assignment of error is without merit, for he did not bring it forward in his brief nor cite any authority in support of his position. The defendant, therefore, is deemed to have waived his one assignment of error and the appeal must be dismissed. *State v. Gaiten*, 8 N.C. App. 66, 173 S.E. 2d 646 (1970);

State v. Tillman

State v. Black, 7 N.C. App. 324, 172 S.E. 2d 217 (1970) ; Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[2] In his brief the defendant has presented three reasons to this court why he feels that he is entitled to a new trial. Despite the fact that they are improperly presented, we have given them full consideration and find them to be without merit.

The defendant first contends that the record shows on its face that he lacked the mental capacity to stand trial and assist in his own defense. The defendant had testified that he had been drinking wine all afternoon on the day the offense took place and does not remember going into the Boy Scouts building. On cross-examination the defendant admitted that he had been convicted of breaking and entering on several previous occasions. The record does not show that defendant was incapable of standing trial.

The defendant next contends that the trial court abused its discretion in failing to recess the trial and order a psychiatric evaluation of the defendant. The record shows that the defendant did not request such a recess and evaluation. Absent such a request, clearly, the trial court did not abuse its discretion.

Finally, the defendant argues that the trial court abused its discretion in failing to submit the question of his mental capacity to the jury, even though the defendant did not request such instructions. Insanity is an affirmative defense and the burden of carrying it is upon the defendant. *State v. Wood*, 230 N.C. 740, 55 S.E. 2d 491 (1949) ; *State v. Harris*, 223 N.C. 697 28 S.E. 2d 232 (1943). No evidence was presented at the trial which would tend to show that the defendant was insane. Voluntary intoxication is not a defense. *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22 (1972) ; *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888).

Appeal dismissed.

Judges BRITT and HEDRICK concur.

In re Hennie

IN THE MATTER OF: CARLETTE HENNIE BORN: AUGUST 20, 1971

No. 7421DC398

(Filed 7 August 1974)

1. Appeal and Error § 24— assignments of error not supported by objections or exceptions

Purported assignments of error not supported by objections or exceptions will not be considered by the appellate court. Court of Appeals Rules 19 and 28.

2. Parent and Child § 1— termination of parental rights

The evidence supported the court's order terminating parental rights of the mother on the ground of physical abuse of the child.

APPEAL by respondent from *Alexander, Judge*, 9 November 1973 Session of FORSYTH County District Court.

Jennie Lee Hennie, the respondent in this matter, is an unmarried female in the tenth grade at Carver School in Forsyth County. Carlette Hennie is her second illegitimate child. A summons and petition were served on 19 May 1973, upon the respondent alleging certain conditions concerning the child. The petition alleged that on 15 December 1971, the Forsyth County Department of Social Services received a complaint from Reynolds Hospital that Carlette had been in the clinic with a fractured arm, and the doctor felt it was difficult for the fracture to have occurred the way the mother described it. On 24 March 1972, the Forsyth County Department of Social Services received a referral from the Baptist Hospital stating that Carlette had been examined and was suffering from second or third degree burns and a fractured skull. The attending physician felt that the story from the respondent regarding the accident could not have been true. On 20 April 1972, Carlette was found to be a neglected child and an abused child, and the custody was taken from the mother and placed with Forsyth County Department of Social Services.

On 24 March 1972, an immediate custody order had been signed removing the child from the home and temporarily placing her custody in the Forsyth County Department of Social Services. On 30 October 1973, a hearing was conducted at which evidence was presented to the court to assist the court in determining whether permanent custody should be placed in the Department of Social Services and parental rights of the respondent should be terminated. Medical testimony was presented

State v. Wilkins

that the child had no emotion for the mother and that the mother never expressed deep concern for the child. The previous order had found that the respondent decided to keep the child only when she learned that she would receive more public assistance with two children instead of one.

The court concluded that the child had been so physically abused that it would be in the best interest of the child not to be returned to the parent. All parental rights were terminated, and full custody of the child was placed with the Forsyth County Department of Social Services. The respondent gave notice of appeal.

Chester C. Davis for petitioner-appellee.

Kennedy and Kennedy by Annie Brown Kennedy for respondent-appellant.

CARSON, Judge.

[1, 2] No objections or exceptions were entered by the respondent during the hearing. The purported assignments of error are not proper and ought not be considered by this court. Rules 19 and 28, Rules of Practice in the Court of Appeals of North Carolina. The exception to the signing of the judgment is the only exception properly presented. *Moore v. Brokers, Inc.*, 9 N.C. App. 436, 176 S.E. 2d 355 (1970); *Highway Comm. v. Rankin*, 2 N.C. App. 452, 163 S.E. 2d 302 (1968). It appears from an examination of the record that there was an abundance of facts to support the order of the court.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. CORNELL SIDNEY WILKINS

No. 746SC486

(Filed 7 August 1974)

Criminal Law § 155.5— failure to docket record in apt time

Appeal is dismissed for failure to docket the record on appeal within the enlarged time allowed by order of the trial court.

State v. Wilkins

APPEAL by defendant from *Rouse, Judge*, 1 November 1973 Session of Superior Court held in NORTHAMPTON County. Heard in the Court of Appeals on 20 June 1974.

This is a criminal action wherein the defendant, Cornell Sidney Wilkins, was charged in bills of indictment, proper in form, with armed robbery and assault with intent to kill inflicting serious injuries. The defendant entered a plea of not guilty to both charges and the State offered evidence tending to establish the following:

On 13 August 1973 Mrs. Winnie Davis was operating a store located on highway #158. At approximately 3:30 p.m., the defendant came into the store and purchased several items. Defendant stood around the store for a few minutes and then asked for an orange drink. As Mrs. Davis turned toward the defendant, after giving him his drink and placing his money in the cash register, the defendant struck her several times with the drink bottle. Defendant then ordered Mrs. Davis to lie down on the floor and he struck her several more times. Mrs. Davis testified that she heard the cash register being opened and that when the defendant left and she was able to get up she discovered that some \$920.00, which had previously been in the cash register, was missing. Mrs. Davis also observed a small red station wagon with Virginia plates leaving from the general vicinity of the store.

The defendant was apprehended a short time later in some woods near a red station wagon which had been abandoned. Later the area in the woods where defendant was first seen was searched and this search uncovered \$918.00 in a burlap bag, a pair of brown trousers, a pair of shoes, a watch, a key which opened the door to the station wagon and worked in the ignition switch of the car.

Dr. Charles Sawyer testified that he treated Mrs. Davis for multiple scalp, head, and facial lacerations which required sixty to seventy stitches to close.

Mr. Glen Glensne, a chemist, testified that he examined the trousers, shoes, and other items, and that he discovered that the brown trousers had human blood type "A" on them. It was stipulated that Mrs. Davis' blood type was "A".

The defendant offered evidence tending to show that he was the owner of a red station wagon with Virginia plates and

State v. Wilkins

that he did stop at the store operated by Mrs. Davis. However, defendant testified that he only purchased an orange soda from her and when he left the store she was just sitting there. Defendant further testified that he pulled his car behind a barn so that he could go in the woods and "relieve" himself and he denied having ever seen the brown pants, the shirt or shoes which were offered into evidence. The defendant also offered evidence of his good character and reputation.

After hearing the evidence, the jury returned verdicts of guilty as to assault with a deadly weapon inflicting serious injury and armed robbery. The trial court adjudged that the defendant be imprisoned for the term of thirty (30) years for the armed robbery and for five (5) years for the offense of assault with a deadly weapon inflicting serious injury. This latter sentence is to run concurrently with the sentence imposed upon the charges of armed robbery. The defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Lester V. Chalmers, Jr., for the State.

Theaoseus T. Clayton for defendant appellant.

HEDRICK, Judge.

Rule 5 of the Rules of Practice of this Court provides that if the record on appeal is not docketed within 90 days after the date of the judgment appealed from, the case may be dismissed; provided, the trial court may for good cause shown extend the time of docketing for an additional period not exceeding 60 days. In the case at bar, the judgment appealed from was entered on 1 November 1973 and the record on appeal was not docketed until 17 April 1974. This is a period of 168 days. Although the time period during which the defendant could docket his appeal was enlarged to the maximum of 150 days, it is obvious that defendant has failed to comply with this deadline. For this reason the defendant's appeal must be dismissed.

Nevertheless, we have considered each of the assignments of error brought forward and argued on this appeal and find them to be without merit.

The defendant was afforded a fair trial free from prejudicial error.

Melton v. Melton

Dismissed.

Chief Judge BROCK and Judge CAMPBELL concur.

JOHN ROBERT MELTON v. HAZEL MELTON

No. 7429DC315

(Filed 7 August 1974)

1. Appeal and Error § 39— failure to docket record in apt time

Appeal is dismissed for failure to docket the record on appeal within 90 days after the date of the judgment appealed from. Court of Appeals Rule 5.

2. Appeal and Error § 39— time for docketing record — extension of time to serve case

An extension of time for service of the case on appeal does not affect the time in which to docket the record on appeal.

APPEAL by plaintiff from *Hart, Judge*, 17 October 1973 Session of District Court held in RUTHERFORD County. Heard in the Court of Appeals on 13 June 1974.

The factual circumstances of this case are perhaps best explained by setting forth the following chronology of events:

On 2 March 1972 the plaintiff John Robert Melton and his wife, the defendant Hazel Melton, separated and the defendant and the two minor children born of the marriage moved to South Carolina. Thereafter, on 29 November 1972, the Family Court of Spartanburg County, South Carolina, entered an order awarding the custody of the two minor children to the defendant.

On 5 March 1973 plaintiff instituted the present action in which he sought an absolute divorce and custody of the two minor children. Judgment of absolute divorce was entered on 10 May 1973; however, the court at that time refrained from making a determination as to the issue of the custody of the two minor children and stated that this question "was retained for further orders of the Court". On 8 August 1973 an order was entered declaring "that the jurisdiction of this cause regarding the adjudication of the custody of the minor children is vested exclusively in the Courts of North Carolina." On 29 August 1973 the custody of the two minor children was granted to the plaintiff by the District Court of Rutherford County.

Melton v. Melton

Subsequent to the two orders of August 1973, the defendant moved to set aside these orders and also moved for an order requiring the plaintiff to return the custody of the two minor children to the defendant. On 15 November 1973 Judge Hart entered an order wherein he made findings of fact which are in large part repetitious of what we have stated above; however, the order did contain further findings which are stated below:

"1. That the notice of setting of the hearing before the Honorable W. B. Matheny, for August 29, 1973, was not served as contemplated by law and that more specifically said notice was not served until September 7, 1973.

* * *

5. That the order entered by the Family Court of Spartanburg County, South Carolina, on September 11, 1973, adjudicated the rights of the parties, inter se; and that said order was entered pursuant to the motion of John Robert Melton, the plaintiff herein.

6. That pursuant to said order of the Family Court of Spartanburg County, South Carolina, dated September 11, 1973, the plaintiff herein, John Robert Melton, lawfully removed the said two minor children to Rutherford County, North Carolina, for a period of visitation and that he has not returned said children to the defendant herein in Spartanburg County, South Carolina, in contravention of said order."

No exceptions were noted to these findings of fact by the plaintiff. Based on its findings of fact, the court vacated the orders of 8 and 29 August 1973 and returned the custody of the two minor children to the defendant.

From this latter order, the plaintiff appealed.

Robert L. Harris for plaintiff appellant.

No counsel contra.

HEDRICK, Judge.

[1] Rule 5 of the Rules of Practice of this Court provides that if the record on appeal is not docketed within 90 days after the date of the judgment appealed from, the case may be dismissed. The record on appeal in the instant case was not docketed in

Campbell v. Campbell

this court within the 90 day period and for failure to comply with this requirement, the appeal is dismissed.

[2] Although the record does contain an order extending the time for service of the case on appeal, nowhere in this order is there an extension of time in which to docket the record on appeal. An extension of the time for service of the case on appeal does not affect the time in which to docket the record on appeal. As stated by Judge Brock, now Chief Judge, in *Smith v. Starnes*, 1 N.C. App. 192, 160 S.E. 2d 547 (1968) :

“The time for docketing the record on appeal in the Court of Appeals is determined by Rule 5, *supra*, and should not be confused with the time allowed for serving case on appeal and the time allowed for serving counter case or exceptions. The case on appeal, and the counter case or exceptions, and the settlement of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under Rule 5. The trial tribunal, upon motion by appellant, and upon a finding of *good cause* therefor, may enter an order extending the time for docketing the record on appeal in the Court of Appeals not exceeding a period of 60 days beyond the 90 days provided by Rule 5. However, this cannot be accomplished by an order allowing additional time to serve case on appeal.”

The appeal is

Dismissed.

Chief Judge BROCK and Judge CAMPBELL concur.

CHARLOTTE CAROL CAMPBELL v. DENNIS EDWARD CAMPBELL

No. 7420DC248

(Filed 7 August 1974)

Appeal and Error § 39— failure to docket record in apt time

Appeal is dismissed for failure to docket the record on appeal within 90 days from the date of the judgment appealed from. Court of Appeals Rule 5.

Campbell v. Campbell

APPEAL by defendant from *Crutchfield, Judge*, 8 October 1973 Session of STANLY County District Court.

This action was filed by the plaintiff wife against the defendant husband on 5 July 1973, seeking temporary and permanent alimony, child custody and support, and the possession of various property. A show cause order was entered on the same day directing the defendant to appear and show cause, if any he had, why the relief sought should not be granted. A general denial and counterclaim were filed by the defendant asking monetary relief as a result of certain actions on the part of the plaintiff in taking a joint savings account and other personal property without the permission of the defendant. The plaintiff filed a reply denying the allegations of the counterclaim and again asking for the relief demanded in the complaint.

A motion was filed on 4 August 1973, by the defendant asking that the plaintiff be ordered to remain away from the premises where the defendant was living and where he had his office. An order was entered by the court on the same day granting the relief sought by the defendant. On 25 August 1973, the court considered testimony of the plaintiff and witnesses to determine if an emergency order was justified considering all circumstances of the case. Finding in the affirmative, the court entered an order the same date granting possession of the home to the plaintiff and possession of the place of business to the defendant, granting custody of the children to the plaintiff pending further orders of the court, ordering child support to be paid in the amount of \$35.00 per week for each child, and ordering temporary alimony in the amount of \$80.00 to be paid each week. The defendant entered an objection and exception to this order but did not attempt to appeal.

On 24 September 1973, the defendant filed a lengthy motion setting forth various acts of misconduct on the part of the plaintiff and requesting that the plaintiff's complaint be dismissed, that the order of 25 August 1973, be vacated, that the defendant be declared not liable for the support of the plaintiff, that the custody of the children be awarded to the defendant, and that certain property be returned to the defendant. A hearing was held on 8 October 1973, at which both parties and their attorneys were present. The court modified the order of 25 August 1973, to the extent that the plaintiff was granted the possession of the portion of the building used for her office, the

Campbell v. Campbell

defendant was granted the exclusive possession of the portion of the building used for his office, and each party was directed to stay away from the premises of the other. The motion to dismiss was denied and the order to pay temporary alimony to the plaintiff was stricken, leaving him responsible only for child support. To the entry of this order, the defendant excepted and gave notice of appeal.

The case on appeal was tendered to the plaintiff on 30 November 1973. No objection or counter case was filed. The judgment had been entered on 8 October 1973, and the case on appeal was filed in this court on 10 January 1974.

Wade and Carmichael by J. J. Wade, Jr., for plaintiff-appellee.

E. A. Hightower for defendant-appellant.

CARSON, Judge.

The plaintiff has moved to dismiss the appeal pursuant to provisions of Rule 5, which require the case on appeal to be docketed in the Court of Appeals within 90 days from the entry of the order appealed from. The appellant did not docket the case within 90 days as required by Rule 5, and he did not obtain an extension of time in which to docket said appeal. We hold, therefore, that the motion should be allowed and that the appeal must be dismissed. *James v. Harris*, 9 N.C. App. 733, 177 S.E. 2d 306 (1970); *Public Service Co. v. Lovin*, 9 N.C. App. 709, 177 S.E. 2d 448 (1970).

Although the appeal must be dismissed for the failure to docket, we have nevertheless examined the contentions of the parties. We note that the order appealed from is an interlocutory order. The provisions for temporary alimony have already been stricken. The show cause hearing for the other relief has not been held. We feel that the contentions of the defendant can be adequately propounded at that hearing; and if he is entitled to relief, it will be forthcoming in the near future.

Appeal dismissed.

Judges PARKER and VAUGHN concur.

State v. Wright

STATE OF NORTH CAROLINA v. FRANKIE WRIGHT

No. 7410SC386

(Filed 7 August 1974)

Criminal Law § 169—harmless error in admission of evidence

In a prosecution for breaking and entering and larceny, the admission over objection of testimony by an accomplice that defendant was with him when he broke into other buildings on previous occasions was not prejudicial error where similar testimony was thereafter admitted without objection and where the State presented an abundance of other evidence of defendant's guilt of the crimes charged.

APPEAL by defendant from *Bailey, Judge*, 17 December 1973 Session of WAKE County Superior Court.

The defendant was charged in bills of indictment with the felonies of breaking and entering with the intent to commit larceny, and larceny as a result of the breaking and entering. Pleas of not guilty were entered as to each count. From a verdict of guilty as charged and an active sentence imposed thereon, the defendant gave notice of appeal.

The State's evidence tended to show that Annie Gray Meyer owned and operated a building known as 401 Tavern, located at Wake Forest, North Carolina. She worked at the tavern on 3 September 1973, and closed the tavern for the night. When she arrived at the premises the next day, she observed that a window had been broken at the back of the tavern. Various machines had been broken into, and the coins contained therein had been stolen. Also missing were a tape player, speakers, and a gun. The building was in a general state of disarray, and the contents had been scattered around on the floor.

Bruce Johnson testified that he knew Frankie Wright and was with him on the night that the crime took place. He stated that he and Wright went to the 401 Tavern at approximately 1:30 a.m. Johnson helped Wright force the window and boosted him inside. The defendants placed socks over their hands and went into the building. Johnson showed the sheriff of Franklin County where the guns and speakers were hidden, and the property was turned over to him.

On redirect examination, Johnson testified that he had been involved in breaking and entering before. He was asked if he was alone on those other occasions when he broke in and

State v. Wright

entered buildings. He answered that he was not alone. He was asked who was with him. He answered "Frankie, Frankie Wright". Defense counsel promptly objected, and the objection was overruled. Without further objection, the witness testified that he had been charged with breaking and entering five places. He further stated that the defendant was with him on all five of the occasions.

The defendant testified that he was not with Johnson on the night in question. He denied ever having gone into the 401 Tavern.

Attorney General Robert Morgan by Assistant Attorney General William W. Melvin for the State.

Arnold and Adams by Brenton D. Adams for the defendant.

CARSON, Judge.

The only question presented by this appeal is whether the trial court committed error in overruling the defendant's objection to the answer of the question of who was with him on the previous breaking and entering. Normally, previous acts of misconduct are admissible against a defendant, who testified in his own behalf, to impeach his testimony. *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971). Since the defendant had not taken the witness stand, questions concerning prior acts of misconduct on his part were not admissible for this purpose. However, the witness had answered the question before an objection was entered. Subsequently, the witness testified without objection that he had broken into five other places and that Frankie Wright had been with him on each of the occasions.

Generally, the admission of evidence over objection is not prejudicial where evidence of similar kind is thereafter admitted without objection. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Blount*, 20 N.C. App. 448, 201 S.E. 2d 566 (1974). Even if erroneously admitted, it would not have been prejudicial since the same evidence was subsequently given.

The likelihood of prejudicial error is further diminished by the abundance of evidence against the defendant. There does not seem to be a substantial likelihood of mistake even if the answer should have been stricken. We hold, therefore, that the defendant received a fair and impartial trial, free from prejudicial error.

State v. Tuggle

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RENARD WAYNE TUGGLE

No. 7418SC438

(Filed 7 August 1974)

ON *certiorari* to review the order of *Copeland, Judge*, entered at the 9 April 1973 Session of GUILFORD County Superior Court.

The defendant was charged in a bill of indictment with the felony of armed robbery. A plea of not guilty was entered. From a judgment of guilty as charged and the imposition of a sentence of not less than fifteen nor more than twenty years pronounced thereon, the defendant gave notice of appeal.

The State's evidence tended to show that on 20 November 1972, at about 7:00 p.m., the defendant went into the Flash Market in Guilford County with a twelve gauge shotgun. He pointed the gun at the attendant on duty and demanded that she give him the money. She opened the cash register, took the money and handed it to the defendant. The defendant ordered her to go to the back of the store. When she turned around several minutes later, the defendant was gone.

The defendant presented evidence on his behalf. He denied being in the store on the date in question and denied having a shotgun in his possession.

Attorney General Robert Morgan, by Assistant Attorney General Donald A. Davis for the State.

Richard S. Towers, Assistant Public Defender, for the defendant.

CARSON, Judge.

Counsel for the defendant candidly admits that he has examined the record and finds no prejudicial errors. The only assignment of error is in the signing and entering the judgment as appears of record. We have carefully examined the record

Leary v. Transit Company

proper and, likewise, are unable to find prejudicial error. We hold that the defendant received a fair and impartial trial, free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

ROBERT M. LEARY AND HELEN F. M. LEARY v. AERO MAYFLOWER TRANSIT COMPANY, INC.

No. 7410DC497

(Filed 21 August 1974)

1. Evidence § 36— statement by defendant's employee—exclusion not prejudicial

In an action to recover for loss and damage to plaintiffs' household goods while they were being moved by defendant, the trial court did not err in excluding testimony by the femme plaintiff as to what an agent of defendant had told her with respect to several moves that had previously been made by the company.

2. Carriers § 10— loss of goods — necessity for pleading tariffs

In an action against a common carrier of household goods to recover for loss and damage to plaintiffs' household goods, the trial court did not err in allowing into evidence defendant's tariffs, though the tariffs were not pleaded as a defense, since there was nothing in plaintiffs' complaint which would notify defendant of any necessity to plead its tariffs.

3. Carriers § 9— bill of lading — conditions binding on shippers

Generally, a shipper who signs and receives a bill of lading without objection, after opportunity to inspect it, and permits the carrier to act on it by proceeding with the shipment is presumed to have assented to its terms; furthermore, even though conditions are not on the face of the bill of lading, if the bill of lading expressly states that conditions are to be found on the reverse side thereof, the bill of lading comes within the general rule, and the shipper is generally held to be bound by the conditions found on the reverse side.

4. Carriers §§ 9, 10— limitation of liability in bill of lading — applicability upon loss of goods

Where the contract between plaintiff shippers and defendant common carrier was entered into in Canada and there was no evidence as to where the loss of plaintiffs' goods occurred, the trial court properly refused to apply the Carmack Amendment of the Interstate Commerce Act prohibiting the limitations of liability attempted by defendant by its tariff and bill of lading.

Leary v. Transit Company

APPEAL by plaintiffs from *Barnette, Judge*, 25 February 1974 Session, District Court, WAKE County. Heard in the Court of Appeals 31 May 1974.

In early 1970, plaintiffs were residents of Ottawa, Canada, but decided to move to some point in the United States, their ultimate destination being at that time unknown to them. The femme plaintiff, by use of a telephone directory, called a moving company entitled T. D'Arcy Limited, which held itself out as being an agent for Mayflower. The company sent a representative to the home of plaintiffs. He brought with him a Mayflower brochure and pictures of a Mayflower truck. The court found as a fact that T. D'Arcy was defendant's duly authorized agent in Ottawa. The femme plaintiff at that time stated, in response to question from her counsel, "As to whether I pointed out to him anything unusual about our particular property as distinguishable from household goods in general, yes; I told him two things—one, that it was a larger move than it looked like because of the way I store things; that people somehow think there is less there than there actually is, so I told him that it would probably take him a little bit longer to load it and a little bit longer to pack it than he might think, and the second was that there were a lot of very valuable antique clocks and furniture and pictures, and that sort of thing, that they would have to be crated and handled with great care, and he said that his company was (used to handling this sort of thing, and he described several moves that had come up from the United States, and one had moved into that area, you know, right down the street from us.)" (The portion of her answer in parenthesis was, over objection, ruled inadmissible but gotten into the record by counsel for purpose of appeal.) The information the representative left with plaintiffs stated that goods moved into storage for "usually no more than 180 days" were goods held in storage for later delivery and a service for which the mover would require an additional charge. The information further advised that "during this storage-in-transit period, the items and conditions of your agreement with the moving company apply, NOT the local warehouse regulations." However, the brochure specifically advised that "[a]t the end of the specified storage-in-transit period, and in the absence of final delivery instructions from you, the shipment will go into 'permanent storage' status and will thereafter be subject to rates, terms, and conditions set by the local warehouse. Any further service will then be under a separate contract with the warehouse. Permanent storage

Leary v. Transit Company

warehousing operations are not generally subject to ICC regulations." On 12 June 1970, plaintiffs entered into a contract with defendant under which defendant agreed to move the household effects of plaintiffs from their home in Ottawa to T. D'Arcy Limited's warehouse to be held there as a storage-in-transit pending final instructions from plaintiffs as to the ultimate destination and time of delivery of the property.

Plaintiffs and defendant prepared an inventory of the items to be placed in storage-in-transit and ultimately shipped by defendant, and the male plaintiff signed a bill of lading which, among other things, provided on the left side of the first page: "The shipment will move subject to the rules and conditions of the carrier's tariff (sic) shipper hereby releases the entire shipment to a value not exceeding \$25,000." The blank provided for the figures carried under it the notation "to be completed by person signing below". Immediately thereunder was the following: "Notice: The shipper signing this contract must insert in the space above, in his own handwriting, either his declaration of the actual value of the shipment, or the words '60 cents per pound per article' otherwise the shipment will be deemed released to a maximum value equal to \$1.25 times the weight of the shipment in pounds." Under this appears the signature of male plaintiff and the date June 12, 1970. Under that appeared these words: "Important notice to shippers of household goods." "General information for shippers of household goods" pamphlets have been given to shipper or his agent." This bears an illegible signature characterized as "Carrier or authorized agent of carrier". On the right side of the front page the value of \$25,000 was also inserted, and at the bottom of the column entitled "Weight and services" there was a blank blocked space entitled "Declaration of Documents, Specie, Extraordinary Valued Articles". This space was left blank.

On the second page of the bill of lading, the following appears: "SECTION 1. The carrier shall be liable for physical loss of or damage to any articles from external cause while being carried or held in storage in transit EXCEPT for condition or flavor of perishable articles, and EXCEPT documents, currency, money, jewelry, watches, precious stones or articles of extraordinary value which are not specifically listed on the bill of lading . . ."

On 28 February 1972, plaintiffs instructed defendant to pick up their household effects and deliver them to an address

Leary v. Transit Company

in Raleigh. Defendant did, on 13 March 1972, pursuant to these instructions, pick up the goods stored by plaintiffs and load it onto defendant's truck for delivery to Raleigh on 16 March 1972. The driver, as was his duty, checked off the items on the inventory sheet which had been made when the items were stored and prepared a three page exception sheet for those items which were damaged while in storage or those items not delivered to him by D'Arcy. These items are not in dispute here. When the goods arrived in Raleigh, more items were missing and more items were damaged. Among the items missing were the following: an antique ceramic jug, valued at \$85; carton containing antique woodworking tools, valued at \$300; antique trunk, valued at \$80; wooden crate containing professional files and other documents, valued at \$2,000; and a 12 by 15 foot oriental rug, valued at \$1,000. The total value placed on these items was \$3,465. The court heard the matter without a jury and entered judgment for plaintiffs in the amount of \$2,302 but found as a fact that the items having a total value of \$3,465 constituted documents and articles of extraordinary value which plaintiffs were specifically required to list on the bill of lading. It further found that they did not so list them nor at any time during the contract negotiations with defendant or any of its agents did they specifically state that any of the items to be shipped were documents or articles of extraordinary value. Plaintiffs excepted to these findings of fact and to the conclusion of law based thereon that plaintiffs were not entitled to recover the \$3,465 and appealed.

John V. Hunter, III, for plaintiff appellants.

Teague, Johnson, Patterson, Dilthey and Clay, by Robert W. Sumner, for defendant appellee.

MORRIS, Judge.

[1] Plaintiffs first argue that certain evidence was erroneously excluded. The record does not show what the question was, so we cannot know whether the objection was to the form of a question, the content of a question, or the form or content of an answer or attempted answer. It is of no consequence, however, for the contention is without merit. Plaintiffs' counsel apparently had inquired of the femme plaintiff whether she had pointed out to the defendant's representative anything unusual about their property as distinguishable from household goods generally. The witness responded that she had told him two

Leary v. Transit Company

things—one, that it was a larger move than it appeared because of the way she stored things; and the second was that “there were a lot of very valuable antique clocks and furniture and pictures, and that sort of thing, that they would have to be crated and handled with great care, and he said that his company was”—At this point defendant objected, the objection was sustained, and the court allowed the witness to answer for the record. Her answer was “He said that his company was used to handling this sort of thing, and he described several moves that had come up from the United States, and one had moved into that area, you know, right down the street from us.” Plaintiffs contend that the answer is admissible under the general rules applying to admissions by agents and employees. We fail to see any prejudicial error in its exclusion. The answer to the assumed original question never mentions any one of the articles involved on appeal. The excluded portion certainly does not. The court obviously found an agency relationship between T. D’Arcy Limited and defendant, and that question is not before us on appeal. The excluded portion of the answer contains no admission of an agent which would be beneficial to plaintiffs. Certainly, its exclusion does not constitute reversible error.

[2] Plaintiffs next contend that the admission into evidence of defendant’s tariffs, over objection, was error because the tariffs were not pleaded as a defense and also because there was no evidence that they were lawfully in effect. In their brief, plaintiffs apparently take the position that the existence of the tariff is an affirmative defense and must be pled. They offer no authority for this position, except to state that the analysis found in 2A Moore’s Federal Practice, § 8.27 (3), indicates that under Rule 8(c) a defendant should plead affirmatively any avoidance or affirmance which goes beyond a mere negation of the plaintiff’s prima facie case. We do not disagree with this position. In this case, however, the plaintiffs, in their complaint, said nothing to indicate to defendant that claim for full value would be made for these specific items. The complaint merely alleged that “defendant, in consideration of a reasonable compensation to be paid by the plaintiffs, agreed to safely carry certain household furniture, appliances, and other personal property belonging to the plaintiffs from Ottawa, Ontario, Canada, to Raleigh, Wake County, North Carolina.” The complaint further alleged that plaintiffs’ property was received by Mayflower on or about 13 March 1972, in Ottawa, for which delivery defendant executed and gave to plaintiffs its bill of lading, thereby acknowledging

Leary v. Transit Company

receipt of the goods in good order; that the property was in sound condition when delivered to Mayflower and, in exercise of ordinary care, could have been delivered to its destination without loss or delay; that defendant was negligent in particular respects and had exclusive possession, control and management of the property from the time of its receipt by it in Ottawa until it was delivered in a damaged condition in Raleigh at a time later than it contracted to deliver the goods. Defendant's answer was an admission that it agreed to carry the goods as alleged and a denial of all other allegations. We see nothing in the complaint which would notify defendant of any necessity to plead its tariff. Indeed, it was not until trial that defendant had any notice that plaintiffs claimed that articles of extraordinary value were included in the shipment. Plaintiffs do not argue their contention that there was no evidence that the tariffs were lawfully in effect. This candor is commendable in view of the fact that plaintiffs introduced into evidence the bill of lading which referred to the tariff and specifically provided that "the shipment will move subject to the rules and conditions of the carrier's tariff". The bill of lading also contained, at the top thereof, the following: "Received subject to classifications, tariffs, rules and regulations including all terms printed or stamped hereon or on the reverse side hereof in effect on the date of issue of this bill of lading." Immediately under Mr. Leary's signature as to value appeared this " 'IMPORTANT NOTICE TO SHIPPERS OF HOUSEHOLD GOODS.' 'General Information for Shippers of Household Goods' pamphlets have been given to shipper or his agent." This was signed by an agent of the carrier. This pamphlet, introduced in evidence by both plaintiffs and defendant, was identified by both Mr. and Mrs. Leary, both of whom testified that they read it prior to the move and were familiar with its contents. The tariff was identified, without objection, as the tariff which was in effect for the year of 1970. The bill of lading, which Mr. Leary signed and with which he said he was familiar, and the pamphlet issued by the Interstate Commerce Commission entitled "Summary of Information for Shippers of Household Goods", which both plaintiffs admitted having read, were sufficient to put them on notice that their shipment was subject to defendant's tariff on file with the Interstate Commerce Commission.

With respect to the bill of lading and tariff, "Ordinarily, the contract is embodied in the shipping receipt or bill of lading, but this does not constitute the entire contract; rather, such

Leary v. Transit Company

receipt or bill and the operative tariffs and schedules constitute the entire contract of carriage." 13 Am. Jur. 2d, Carriers, § 226, p. 741, and cases there cited.

[3] While it is true that an oral agreement to do a certain thing is not necessarily merged by a later bill of lading, *McAbsher v. R. R.*, 108 N.C. 344, 12 S.E. 892 (1891), here there was no evidence of any oral agreement with respect to any specific items included in the shipment either with respect to value or handling. The only scintilla of evidence in this respect is the reference by both Mr. and Mrs. Leary to antique clocks. These are not the subject of this appeal, nor was there any oral agreement even with respect to those. Mr. Leary did testify that when he signed the bill of lading, there were certain places left blank. These were the address and other information with respect to the place and time of delivery in Raleigh. The values and all other pertinent information was in the bill of lading. In *Schroader v. Express Agency*, 237 N.C. 456, 459, 75 S.E. 2d 393 (1953), the Supreme Court, through Parker, J., (later C.J.) said:

"A bill of lading is said to be both a contract and a receipt. It is a receipt for the goods shipped, and a contract to transport and deliver the same *as therein stipulated*." (Emphasis supplied.)

Generally, the majority view is that a shipper who signs and receives a bill of lading without objection, after opportunity to inspect it, and permits the carrier to act on it by proceeding with the shipment, is presumed to have assented to its terms. 13 Am. Jur. 2d, Carriers, § 273. Additionally, even though conditions are not on the face of the bill of lading, if the bill of lading expressly states that conditions are to be found on the reverse side thereof, as this one did, the bill of lading comes within the general rule, and the shipper is generally held to be bound by the conditions found on the reverse side. 13 Am. Jur. 2d, Carriers, § 274.

In the case before us, there is no evidence which would justify applying any rule other than the general rules set out above. Plaintiffs contend, however, that even if the tariff was admissible and even if the plaintiffs are bound by the conditions set out in the bill of lading and tariff requiring listing of "articles of extraordinary value" in order to recover for their loss, the defendant cannot rely thereon because the provisions of 49

Leary v. Transit Company

U.S.C.A. 20(11), commonly known as the Carmack Amendment to the Interstate Commerce Act, prohibit limitation of liability, which Amendment reads as follows:

“Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefore, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading * * * ; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable * * * for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading.”

Of course, the crucial words are “. . . receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country . . . ” Plaintiffs rely on the case of *Railway Express Agency, Inc. v. Hueber*, 191 S.W. 2d 710 (Tex. Civ. App. 1945), a case which is quite similar factually to the case at bar. There, one Hueber allegedly shipped some gold and silver nuggets, foreign coins and other articles of unusual value, from Los Angeles, California, to San Antonio,

Leary v. Transit Company

Texas. They were lost, either in transit or after storage by the Express Agency. The express receipt contained a provision to the effect that the Express Company would not be liable for the loss of articles of extraordinary value unless the articles were enumerated on the receipt. The Court held, and we think properly, that the provision was an attempt to limit the liability of the carrier and, therefore, positively prohibited by the Carmack Amendment. We would agree that the provision in the bill of lading and tariff in the case now before us is a limitation and not an exclusion. Obviously, Mayflower handled the articles which were lost and was prepared to handle them. They did not exclude them from their transportation but attempted to limit their liability for loss of or damage to those articles only to situations where they were separately listed. Hueber, however, involved interstate commerce between two states and not from a state to an adjacent foreign country and more specifically not *from an adjacent foreign country to a state in the United States*. The same is true of *Missouri Pacific Railroad Company v. Elmore & Stahl*, 360 S.W. 2d 839 (Tex. Civ. App. 1962).

In *Watson v. Canadian Pac. Ry. Co.*, 237 Ill. App. 478 (1925), the shipment which was composed of cattle, originated in Canada and the ultimate destination was Chicago, Illinois. The contract of shipment provided that the shipper would not be liable for anything done or omitted to be done off the lines operated by it, and that where the destination to be reached was not on the lines operated by the defendant, it was to act only as the agent of the owner or shipper in handing over the cattle to connecting carriers. It appeared from defendant's special plea entered in the case that none of the damages occurred on defendant's lines and further that none of the services performed by defendant was in the United States, it having delivered the cattle to a connecting carrier in Canada. Plaintiff in that case contended that under the contract entered into for the transportation of the cattle, the services were to be partly performed in the United States and partly in Canada, an adjacent foreign country, and, therefore, defendant was liable under the Carmack Amendment, relying on *Galveston, H. & S. A. R. Co. v. Woodbury*, 254 U.S. 357, 41 S.Ct. 114, 65 L.Ed. 301 (1920). In *Woodbury*, Mrs. Woodbury bought a round trip ticket from a railroad company in Canada entitling her to travel over that road in Canada and connecting lines to El Paso, Texas, and return. On the return trip her trunk, which had been checked, was lost by a railroad company in Texas. The Supreme Court, in an opinion

Leary v. Transit Company

by Mr. Justice Brandeis held that the \$100 limitation in value was not applicable. In doing so, the Court passed on § 1 of the Interstate Commerce Act, not § 20 (the Carmack Amendment), and held that although § 1 of the Interstate Commerce Act contained the provision that it was to be applicable to the transportation of passengers and property "*from any place in the United States to an adjacent foreign country*", it was equally applicable to a common carrier engaged in transporting passengers and property *to the United States from an adjacent foreign country*. The Court said:

"A carrier engaged in transportation by rail *to an adjacent foreign country* is, at least ordinarily, engaged in transportation also *from that country to the United States*. The test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operations. This is the construction placed upon the act by the Interstate Commerce Commission." [*Galveston v. Woodbury, supra*, 254 U.S. at 359-360.]

The Illinois Court in *Watson*, because there was no denial of and no evidence to disprove defendant's special plea that all the services rendered by defendant were rendered in Canada, affirmed the Circuit Court's dismissal of plaintiff's case. One Justice in a special concurring opinion noted that although he did not agree with all that had been said in comparing §§ 1 and 20 of the Interstate Commerce Act, he would agree that defendant would probably be liable if its *own service had extended into the United States*. A similar result was reached in *Southern Pac. R. R. Co. v. Gonzalez*, 48 Ariz. 260, 61 Pac. 2d 377 (1936). There the initial carrier was in Mexico and its services were performed wholly outside the United States.

Other courts have considered the question and with varying results under varying fact situations: *Goldberg v. Delaware, L. & W. R. Co.*, 40 N.Y. Supp. 2d 44 (Mun. Ct. of City of New York, Fourth District 1943), holding that although Congress cannot exercise extraterritorial authority over a foreign carrier, it does have jurisdiction as against a domestic carrier which unites with a railroad in Canada in the publication of a joint *through rate* from a point in Canada to a point in the United States; *Strachman v. Palmer*, 82 F. Supp. 161 (U.S. D-Ct. Mass. 1949), holding unequivocally that the Carmack Amendment by its plain, unambiguous language does not govern imports to the

Leary v. Transit Company

United States from Canada (this case contains an excellent discussion of the history and purpose of the Act and the Newton and Cummins Amendments. See also 49 Col. Law Rev. 1009 commenting on Strachman); *Alwine et al v. Pennsylvania R. Co.*, 141 Pa. Super 558, 15 A. 2d 507 (1940), holding also in a well-reasoned and clearly written opinion that the Carmack Amendment insofar as it governs shipments involving adjacent foreign countries, applies only to movements to a foreign country, and not to movements from a foreign country; *Sklaroff et al v. Pennsylvania R. Co.*, 90 F. Supp. 961 (U.S.D.C.E.D. Pa. 1950), finding *Woodbury, supra*, inapposite and following *Alwine, supra*. In 1950, the United States Supreme Court had the question before it but since the precise question decided by the Pennsylvania Court in *Alwine, supra*, was not before it, the Court did not decide the question but said:

"The case of *Alwine vs. Pennsylvania R. Co.* (citation omitted), much relied on by respondent and the Court of Appeals, is not in point. We need not now determine whether that case was correctly decided. For purposes of this case it is sufficient to note that there the Pennsylvania Court emphasized that the shipment came into this country on a *through* bill of lading from Canada. The contract of carriage did not terminate at the border, as in the instant case." *Reider v. Thompson*, 339 U.S. 113, 117, 70 S.Ct. 499, 94 L.Ed. 698 (1950).

[4] We see no need to delve further into the cases and the purposes of the Amendment. In the case before the Court, the evidence supports the court's finding of fact that where the plaintiffs' property was removed from T. D'Arcy Limited in Ottawa on 13 March 1972 for the purpose of loading it onto defendant's truck for removal to Raleigh, N. C. as the property was loaded onto defendant's truck, each item was checked off the inventory and its general condition noted. It was then that defendant's driver noted that some items were damaged and some property was missing. He prepared an exception sheet. When the truck arrived in Raleigh, other items were missing. Among the additional missing items were the items now in controversy. The driver had gone through customs twice—once in Canada and once in the United States. He had stopped in Plattsburgh, N. Y., to pick up a shipment going to Goldsboro, N. C., and had gone first to Goldsboro, N. C., and unloaded that shipment before going to Raleigh to deliver the plaintiffs' property.

Leary v. Transit Company

We are without evidence as to where plaintiffs' loss occurred—whether at Canadian customs, or after the shipment arrived in the United States, still in the control of defendant. We think, under the decisions having reference to this question, this is important. While our sympathies might be with the plaintiffs, we cannot say with certainty that the loss occurred within the United States and apply the law of a decision which would result in applicability of the Carmack Amendment. Suffice it to say, we cannot, in this situation apply the Carmack Amendment prohibiting the limitations of liability attempted by defendant by its tariff and bill of lading to the fact situation before us. The contract was entered into in Canada. We know not where the loss occurred. We are of the opinion that the better reasoned opinions, the plain meaning of the words of the Cummins Amendment, an examination of the history of the Carmack, Cummins, and Newton Amendments (all generally herein referred to as the Carmack Amendment) and reference to Interstate Commerce Commission interpretation thereof [see Heated Car Service Regulations, 50 I.C.C. 620 (1918); In The Matter of Bills of Lading, 52 I.C.C. 671, 683 (1919); cf. *In re The Cummins Amendment*, 33 I.C.C. 682, 693 (1915)] indicate that Congress did not intend that the Amendment's prohibition should apply to shipments originating in an adjacent foreign country and moving into the United States and that, by agreement, such regulation of contracts entered into in Canada for goods moving into the United States was left to the Canadian Commission. Had Congress wished to amend the language it could have done so. Whether the question of avoiding the problem of legislation possibly extraterritorial in effect prevented it is the reason it has not done so is merely speculative.

Under the facts of this case, we think plaintiffs are bound by the terms of the bill of lading and the tariff.

Affirmed.

Judges HEDRICK and BAILEY concur.

Utilities Comm. v. Telegraph Co.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION
v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COM-
PANY

No. 7410UC93

(Filed 21 August 1974)

1. Utilities Commission § 2— approval of utility's securities — application of statutes — multi-state foreign corporation

Article 8 of G.S. Ch. 62 relating to the regulation of the securities of a public utility applies to a multi-state foreign corporation engaged in interstate commerce.

2. Utilities Commission § 2— authority over foreign corporations

The mere fact that a public utility otherwise subject to the jurisdiction of this State is a foreign corporation does not deprive this State of all supervisory and regulatory powers over securities issued by such a corporation. G.S. 55-132(a).

3. Constitutional Law § 27; Telephone and Telegraph Companies § 1; Utilities Commission § 2— approval of issuance of securities — burden on interstate commerce

Statutes and Utilities Commission rules adopted pursuant thereto requiring a public utility to obtain Commission approval before issuing any securities impose an undue burden on interstate commerce in violation of Art. I, Sec. 8, of the U. S. Constitution when applied to Southern Bell Telephone and Telegraph Company, a utility which furnishes intrastate and interstate telephone service to customers in four states, which has less than 18% of its telephones and invested capital located in this State, and which derives from its interstate operations more than 30% of the operating revenues it receives from providing communications services. Art. 8 of G.S. Ch. 62.

APPEAL by Southern Bell Telephone and Telegraph Company from order dated 12 June 1973 entered by the North Carolina Utilities Commission in Docket No. P-55, Sub. 728.

Southern Bell Telephone and Telegraph Company (Southern Bell), a New York corporation which is a subsidiary of American Telephone and Telegraph Company (AT&T), is the member of the Bell system which furnishes intrastate, and interstate telephone and related service to customers in North Carolina, South Carolina, Georgia and Florida. In addition, through interconnection of its facilities, it contributes to providing telephone service throughout the United States and other parts of the world. By letter dated 4 January 1973 the North Carolina Utilities Commission (Commission) called upon Southern Bell to comply with Article 8 of G.S. Ch. 62 and with Commission rules adopted pursuant to that Article by applying for and obtaining prior

Utilities Comm. v. Telegraph Co.

Commission approval before issuing any securities. This request marked a change in Commission policy toward Southern Bell. The matter had been the subject of Commission inquiry as early as 1939, at which time the Commission determined that its prior approval of Southern Bell's securities issues should not be required. The Commission reexamined the question in 1956 and 1957, following which the Commission by letter dated 20 June 1957 informed Southern Bell that the Commission was satisfied that it did not have jurisdiction over sale of stock and issuance of securities by Southern Bell, since it was a foreign corporation subject to the regulatory authority of New York, the State of its incorporation. No change was made in this position until the Commission's letter to Southern Bell of 4 January 1973.

Southern Bell responded to the Commission's 4 January 1973 letter by letter to the Commission dated 22 January 1973 in which it requested that the Commission letter of 20 June 1957 be continued in operation, or in lieu thereof that it be continued on an interim basis as to a pending \$300,000,000.00 Southern Bell bond issue and that Southern Bell be given opportunity to be heard as to a further continuation of the 20 June 1957 letter. Based on Southern Bell's prior reliance on the 1957 exemption letter and on the potentially adverse effect which delay caused by filing might have upon the pending bond issue, the Commission allowed the exemption letter of 20 June 1957 to remain in effect on an interim basis, but notified Southern Bell that further continuation of the exemption would be reviewed by the Commission as a formal docket and set the matter for hearing.

Following hearing, the Commission issued its order dated 12 June 1973 directing Southern Bell, from and after the date of the order, to comply in all respects with the provisions of Article 8 of G.S. Ch. 62 relating to regulation of securities and with the Commission's Rules adopted pursuant to its authority under G.S. Ch. 62. Subsequently, after Southern Bell filed exceptions and notice of appeal, the Commission by order dated 8 August 1973 postponed the effective date of its 12 June 1973 order pending judicial review.

Utilities Comm. v. Telegraph Co.

Commission Attorney Edward B. Hipp and Associate Commission Attorney E. Gregory Stott for the North Carolina Utilities Commission.

Joyner & Howison by R. C. Howison, Jr.; and Moore & Van Allen by James O. Moore for Southern Bell Telephone and Telegraph Company, appellant.

PARKER, Judge.

Article 8 of Chapter 62 of the General Statutes, G.S. 62-160 through G.S. 62-171, entitled "Securities Regulation," provides in general for supervision by the North Carolina Utilities Commission over issuance of securities by a public utility. Specifically, G.S. 62-161(a) provides:

"No public utility shall issue any securities . . . unless and until, and then only to the extent that, upon application by such utility, and after investigation by the Commission of the purposes and uses of the proposed issue, and the proceeds thereof . . . the Commission by order authorizes such issue. . . ."

The word "securities" is broadly defined by the Public Utilities Act to mean "stock, stock certificates, bonds, notes, debentures, or other evidences of ownership or of indebtedness, and any assumption or guarantee thereof." G.S. 62-3(26). The question presented by this appeal is whether the Commission may lawfully require Southern Bell to comply with the provisions of Article 8 and issue securities in the future only after first making application to and obtaining an order from the Commission authorizing such issue. We hold that it may not.

[1] At the outset, we reject Southern Bell's argument that Article 8, "properly construed, is not applicable to a multi-state foreign corporation engaged in interstate commerce." We find nothing in the language of Article 8 or of the Public Utilities Act generally to support this contention. On the contrary, Article 8 throughout refers to public utilities in general, and the Act defines a "public utility" to mean "a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for: . . . 6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation." G.S. 62-3(23)a.6. The

Utilities Comm. v. Telegraph Co.

word "person" includes a corporation. G.S. 62-3(21). Thus, the broad language employed by the Legislature in Article 8 and in other portions of the Public Utility Act clearly brings Southern Bell within its scope. Any doubt that this was the legislative intention is removed by reference to G.S. 62-171, which makes provision for agreements by the Commission with the commission or other regulatory agency of another state "on the issue of stocks, bonds, notes or other evidences of indebtedness by a public utility owning or operating a public utility both in such state and in this State." To construe Article 8 as Southern Bell contends would render G.S. 62-171 meaningless.

[2] We also reject the idea, which apparently was the rationale for the Commission's 20 June 1957 order, that the mere fact that a public utility otherwise subject to the jurisdiction of this State is a foreign corporation somehow deprives this State of all supervisory and regulatory powers over securities issued by such a corporation. G.S. 55-132(a) provides that a foreign corporation holding a certificate of authority to transact business in this State shall "enjoy the same, but not greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued," and we see no reason why this statute should not be given full effect. In Annotation, "Statutory requirements respecting issuance of corporate stock as applicable to foreign corporation," 8 A.L.R. 2d 1185, at page 1187, we find:

"A state, acting through its legislature, in a proper case, and subject only to the limitations of the Federal and state constitutions, has the power to control and regulate domestic and foreign corporations equally, in so far as they operate within the state, including issuances of corporate stock, and can determine the legal effect of such operations."

This brings us to the question whether constitutional limitations apply under the factual situation presented by this case to prevent the Commission from enforcing the provisions of Article 8 against Southern Bell. We hold that they do.

In the order appealed from the Commission failed to make detailed findings of fact. The facts, however, are not in dispute, and by Addendum to the Record, the parties have stipulated and

Utilities Comm. v. Telegraph Co.

agreed to certain facts, including the following which we deem to be particularly pertinent:

On 31 December 1972 Southern Bell had approximately 8,282,000 telephones in service. Of these, approximately 3,402,000 were in Florida, 2,414,000 in Georgia, 1,008,000 in South Carolina, and 1,458,000 in North Carolina. More than 30% of Southern Bell's operating revenues from provision of communication services in the four states is attributable to its interstate operations. On 31 December 1972 Southern Bell's total investment in telephone plants amounted to \$4,740,000,000.00. Of this, \$1,997,000,000.00 was invested in Florida, \$1,361,000,000.00 was invested in Georgia, \$562,000,000.00 was invested in South Carolina, and \$820,000,000.00 was invested in North Carolina. From 31 December 1967 to 31 December 1972 Southern Bell's total investment in telephone plant increased from about \$2,495,000,000.00 to about \$4,740,000,000.00 and annual construction expenditures increased from approximately \$352,000,000.00 in 1968 to \$819,000,000.00 in 1972. Less than half of the dollars needed to support this construction program came from internal sources such as depreciation funds and retained earnings. The remainder came from external sources. Of the \$819,000,000.00 expended in 1972, \$250,000,000.00 came from the sale of debentures and \$210,000,000.00 from additional equity investment by AT&T, Southern Bell's parent. Within the past five years, Southern Bell has issued and sold long-term debentures and/or intermediate-term notes to the public in the aggregate principal amount of \$1,075,000,000.00. During this period AT&T made additional equity investments in Southern Bell in the total amount of \$697,000,000.00. Because of ever-increasing construction program demands, it has been and will continue to be necessary for Southern Bell to obtain large sums of new capital from external financing to supplement its internally generated funds. Southern Bell obtains the external financing which it needs on a day-to-day basis by means of short-term borrowings. The sources for these borrowings are the sale of commercial paper, advances from AT&T, and bank loans. Short-term (less than two years) notes are issued almost daily, and in 1972 borrowings of this type were made by Southern Bell on all but six working days. There are limits to the amount of short-term debt which Southern Bell may incur, and when these limits are reached, the short-term debt must be repaid with the proceeds from some form of permanent financing. Such financing involves additional equity investments by AT&T or the issuance

Utilities Comm. v. Telegraph Co.

and sale to other investors of long-term or intermediate-term debt or a combination of both. Timing of debt issues is all important in that the operational and financial needs of the Company must be reconciled to the atmosphere of the market. The market conditions remain relevant until the last possible moment, when decisions must be made with respect to whether the issue will be long-term debt, intermediate-term debt, or a combination of both, and with respect to whether the sales should be by competitive bidding or negotiated. Since Southern Bell operates a multi-state business, its financing must be governed by the needs and objectives of the Company as a whole, and its securities are rated on the basis of its total performance and overall financial good health. Thus, when the Company issues securities, it is a single and indivisible act on its part whereby it pledges the good faith and credit of the entire Company. The proceeds of Southern Bell's securities issues are utilized for its corporate needs in all states in which it operates.

None of the other states in which Southern Bell operates requires approval of its securities issues. Florida and South Carolina have no statutory provision governing regulation by those states' utilities commissions of the issuance of securities by telephone companies. The State of Georgia has a statute which requires companies subject to the jurisdiction of the Georgia Public Service Commission to obtain approval of securities issues. However, that Commission has issued an order declaring itself to be without jurisdiction of the issuance of stocks, bonds or other evidences of indebtedness by Southern Bell. In the past five years one securities issue has been made each year. Each one of those was subject to the Securities and Exchange Commission (SEC) requirements of registration statement. The registration statement is filed with the Securities and Exchange Commission approximately three weeks before the actual issue. Southern Bell is not required to obtain prior approval from the New York State Commission, but is required to furnish them with a monthly report of all financing, including short-term and long-term, for their review at the end of each month. At the present time the only agency which exercises any sort of prior approval of Southern Bell's financing is the SEC.

[3] Upon the stipulated facts no question has been or can be raised but that Southern Bell is directly and substantially involved in interstate commerce. More than 30% of its operating revenues from providing communications services is derived

Utilities Comm. v. Telegraph Co.

from its interstate operations, and the same equipment which carries its local messages is also used in carrying its interstate messages. It has long been settled, of course, that providing interstate communications is engaging in interstate commerce within the meaning of the Commerce Clause, Art. I, Sec. 8, of the Federal Constitution, *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 24 L.Ed. 708, and a very substantial part of Southern Bell's activities involve transmission of messages interstate and with foreign countries. The question presented by this appeal, therefore, is whether the regulation and control by this State over the issuance of securities by Southern Bell, which the attempted enforcement by the Commission of G.S. Chap. 62, Art. 8, would necessarily entail, would impose such an undue burden on interstate commerce as to make such regulation and control constitutionally beyond the State's power to enforce. We hold that it would.

Under the stipulated facts there can be no question that Southern Bell's continued capability to provide facilities adequate for its ever-growing business, including its interstate business, is directly dependent upon its continuing issuance of securities. It is apparent that at least for the foreseeable future a very large portion of the tremendous volume of capital funds required simply cannot be raised in any other way. Therefore, State regulation and control over issuance of these securities will necessarily involve a large degree of State regulation and control over Southern Bell's ability to carry on its interstate activities. It is true, of course, that absent Federal regulation a state may validly regulate matters of local concern even though to do so may involve some impact upon interstate commerce. In such case, however, the regulation must be one which safeguards some obvious state interest, and the local interest involved must outweigh the national interest in maintaining the free flow of commerce and its freedom from local restraints in matters requiring uniformity of regulation. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915. Here, there has been no showing that the legitimate local interest which this State has to regulate Southern Bell's intrastate services and rates would be in any way impaired by denying to the State the power to regulate and control Southern Bell's issuance of securities. The Commission has never heretofore exercised this power and nothing in the record suggests that it has thereby been hampered in performing its statutory duties over intrastate rates and services. Capital raised by issuance of securities in any event

Utilities Comm. v. Telegraph Co.

does not become part of the rate base until it has been invested in property "used and useful in providing the service rendered to the public within this State," G.S. 62-133(b) (1), and then only to the extent of the fair value of such property. Further, "[t]he choice of the appropriate debt-equity ratio is a management decision, but the board of directors may not thereby tie the hands of the Commission and compel it to approve rates for service higher than would be appropriate for a reasonably balanced capital structure." *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 341, 189 S.E. 2d 705, 720.

The issuance of a security by Southern Bell is a single, indivisible act. While the proceeds may be invested in one state or another as Southern Bell's management may from time to time decide, the issuance of the security cannot be so allocated. Therefore, should the North Carolina Commission exercise its asserted power to prevent Southern Bell from issuing any security without first obtaining the Commission's approval, the inevitable consequence would be that the Commission would be required to inquire into and pass upon the needs of Southern Bell and its customers in Florida, Georgia and South Carolina, matters which are clearly beyond the Commission's lawful authority. If the North Carolina Commission can lawfully regulate issuance of securities by Southern Bell when less than 18% of its telephone and invested capital are located in this State, then the Commission of each of the other states in which Southern Bell does business may likewise exercise such power. The possibility of conflict in an area where uniformity of regulation is essential becomes apparent.

The agreed statement of facts contains a stipulation that "[s]everal other AT&T subsidiary companies are required to seek prior approval of their respective state commission. . . . There are no known chaotic service circumstances caused by the requirement that any of these companies obtain prior approval of their financing, but none of the securities issues have ever been disapproved or modified. It is a perfunctory type operation from the beginning to the end and there is never any doubt as to the approval of the commission. Therefore, it does not cause many problems." Whatever the experience of other utility companies before other state regulatory bodies may have been, we cannot assume that the North Carolina Commission, should its asserted power to regulate issuance of Southern Bell's securities be upheld, would so lightly regard its statutory duties as to

Utilities Comm. v. Telegraph Co.

perform them in "a perfunctory type operation from the beginning to the end." More importantly, the cases reject the view that constitutional limitations on the powers of a state over interstate commerce can come into effect only after there is an actual attempt at multiple regulation or an actual obstruction of commerce. On the contrary, the cases demonstrate that "the possibility of conflict or dual regulation, may be sufficient to curtail powers sought to be asserted by an individual state over interstate commerce where such commerce might be impeded by conflicting and varying regulation." *United Air Lines, Inc. v. Illinois Commerce Commission*, 32 Ill. 2d 516, 207 N.E. 2d 433.

[3] On the stipulated facts, we find such legitimate local interests as might be protected by upholding the Commission's power to regulate issuance of Southern Bell's securities to be only minimally and incidentally involved. At the same time, these facts make manifest that sustaining such state regulatory power raises a substantial possibility of impeding the free flow of interstate commerce. Weighing the relative state and national interests involved, we find that sustaining the asserted State regulatory power as to Southern Bell would impose an undue burden on interstate commerce in contravention of the Federal Constitution. While such a balancing of state and national interests necessarily requires a close appraisal of the varying factual situations presented in each case, our decision here finds support in the decisions in *United Air Lines, Inc. v. Illinois Commerce Commission*, *supra*, and in *Application of United Air Lines, Inc.*, 172 Neb. 784, 112 N.W. 2d 414.

The order appealed from is

Reversed.

Judges BRITT and VAUGHN concur.

Commodities International, Inc. v. Eure, Sec. of State

COMMODITIES INTERNATIONAL, INC. v. THAD EURE, SECRETARY OF STATE; WILLIAM W. COPPEDGE, SECURITIES DEPUTY, AND THE STATE OF NORTH CAROLINA

No. 7410SC408

(Filed 21 August 1974)

1. Injunctions § 5— restraining enforcement of statute

Ordinarily, an injunction will not lie to restrain the enforcement of a statute since the constitutionality, defects or application of the statute may be tested in a prosecution for violation of the statute.

2. Injunctions § 5— restraining enforcement of statute

A party has no standing to enjoin the enforcement of a statute or ordinance absent a showing that his rights have been impinged or are imminently threatened by the statute.

3. Declaratory Judgments § 1— determination of whether options are securities

A declaratory judgment action was appropriate for determination of whether London options sold by plaintiff brokerage firm are securities subject to regulation by the State.

4. Corporations § 16— London options — securities — remand

Action to determine whether London commodities options being sold by plaintiff brokerage firm are "securities" within the meaning of G.S. 78-2(g) is remanded for consideration by the court of the mechanics of the options in question.

APPEAL from *McLelland, Judge*, 4 February 1974 Session of WAKE Superior Court. Heard in the Court of Appeals 30 May 1974.

Plaintiff is a North Carolina corporation with its office and principal place of business in Durham County. On 10 November 1973, plaintiff's president, Kenneth R. Craft, advised William W. Coppedge, Securities Deputy with the office of the Secretary of State, that plaintiff was presently engaged in selling London options. Coppedge thereupon advised Craft that London options were "securities" within the meaning of G.S. 78-2(g) and that their sale without registration with the Secretary of State was a violation of G.S. 78-23.

On 17 December 1973, plaintiff prayed that the Superior Court issue a temporary restraining order, restraining the defendants from prosecuting or enjoining plaintiff for the brokerage of London options pending a hearing for a declaratory judgment on the question of whether London options are securities. The temporary restraining order was granted by Judge

Commodities International, Inc. v. Eure, Sec. of State

Smith, and continued as a preliminary injunction pending the final hearing.

The matter was heard before Judge McLelland at the 4 February 1974 Session of Wake Superior Court, and the parties stipulated, *inter alia*:

"2. Plaintiff is engaged in the business of the brokerage of options on commodity futures contracts offered by sale by the various commodity exchanges in London, England, and more commonly known as London options.

3. London options are options which are covered on the various London exchanges and for which commodity futures contracts exist."

Based on the stipulations of the parties, the court made the following findings of fact and conclusions of law:

"1. The brokerage of London Options by plaintiff entails no financial obligation of plaintiff or the writers of the options to the purchasers, and therefore no evidence of indebtedness is created by these transactions.

2. The premiums paid to plaintiff by purchasers of London Options are prices paid for the rights to the future acquisition of contracts for future delivery of commodities upon presently specified terms with prospect of gain to the payor-purchaser arising from exercise of the options under favorable commodities market conditions and not from the use of the premium.

The payment of such premiums or prices are not, therefore, investments in investment contracts.

3. There is no stipulation and therefore no finding from which the Court might conclude that London Options are commonly known as securities.

4. London Options do not fall within any other statutory definition of security."

The court thereupon permanently enjoined defendants from regulating or prosecuting plaintiff with regard to the brokerage of London options. From this determination, defendants appealed.

Commodities International, Inc. v. Eure, Sec. of State

Attorney General Morgan, by Associate Attorney Jarvis, for defendant appellants.

Clayton, Myrick and McCain, by Grover C. McCain, Jr., for plaintiff appellee.

MORRIS, Judge.

The sole question presented for our determination is whether London options are "securities" subject to regulation by the State under the Securities Law, G.S. Chap. 78. If London options fall within the definition of "securities" in G.S. 78-2(g), then their sale is clearly illegal without prior registration with the Secretary of State. G.S. 78-23(b) ; G.S. 78-19; G.S. 78-6.

[1] At the outset, it behooves us to note that plaintiff's prayer for relief purports to characterize his action both as one for injunctive relief and a declaratory judgment. It is well established that ordinarily an injunction will not lie to restrain the enforcement of a statute, since the constitutionality, defects, or application of the statute may be tested in a prosecution for the violation of the statute. 4 Strong, N. C. Index 2d, Injunctions, § 5.

[2] A party has no standing to enjoin the enforcement of a statute or ordinance absent a showing that his rights have been impinged or are imminently threatened by the statute. *Surplus Co. v. Pleasants*, 263 N.C. 587, 139 S.E. 2d 892 (1965). The order issuing the injunction must be vacated.

[3] However, we feel that this action was proper under the Declaratory Judgment Act, (G.S. 1-253 through G.S. 1-267).

"The courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters. When a plaintiff has a property interest which may be adversely affected by the enforcement of the criminal statute, he may maintain an action under the Declaratory Judgment Act to determine the validity of the statute in protection of his property rights. (Citations omitted.)" *Jernigan v. State*, 279 N.C. 556, 561, 184 S.E. 2d 259 (1971).

G.S. 78-2(g) provides as follows:

"Securities, etc.—The term 'securities' or 'security' shall include any note, stock certificate, stock, treasury stock, bond, debenture, whiskey warehouse receipt, evidence of

Commodities International, Inc. v. Eure, Sec. of State

indebtedness, transferable certificate of interest or participation, certificate of interest in a profit-sharing agreement, any instrument representing any interest or right in or under any oil, gas or mining lease, fee or title, or rights or interests in land from which petroleum or minerals are, or are intended to be produced, certificate of interest in an oil, gas or mining lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in or title to property or profits or any contract or agreement in the promotion of a plan or scheme whereby one party undertakes to purchase the increase or production of the other party from the article or thing sold under the plan or scheme, or whereby one party is to receive the profits arising from the increase or production of the article or thing sold under the plan or scheme, or any other instrument commonly known as security."

The defendants contend that the London options are within the coverage of four clauses of this definition. It is their position that London options are:

- (a) evidence of indebtedness
- (b) investment contracts
- (c) instruments commonly known as securities, and
- (d) "contract[s] or agreement[s] in the promotion of a plan or scheme whereby one party undertakes to purchase the increase or production of the other party from the article or thing sold under the plan or scheme, or whereby one party is to receive the profits arising from the increase or production of the article or thing sold under the plan or scheme."

We deem it fitting to discuss the distinctions commonly recognized between the London or "Mocatto" option and the "naked option" or "new option". In so doing, we note that the stipulations of the parties at the final hearing are the only portions of the record characterizing the options which are the subject of this proceeding.

The traditional option to buy a commodity futures contract—often referred to as a London option or Mocatto option—is an arrangement whereby an investor purchases an option to buy or sell a given quantity of a commodity for a specified price at a date in the future. A "call option" is the right to buy a futures

Commodities International, Inc. v. Eure, Sec. of State

contract at a guaranteed price on or before a specified date. A "put option" is the right to sell a futures contract at a guaranteed price on or before a specified date. See, *King Commodity Company of Texas, Inc. v. State of Texas*, 508 S.W. 2d 439 (Tex. Civ. App. 1974). The investor's profit is represented by the difference in the "striking price" (the price of the commodity on the day the option is purchased) and the price of the commodity on the date of the exercise of the option. Upon exercising the option, the investor actually buys or sells the contract for the commodity. These options are handled through recognized exchanges, and they are in fact backed by existing commodities contracts, although all options referred to as London options by the sellers are not backed by existing commodity contracts.

The new or naked option has adopted the legal form of the London option, but it is not backed by an existing commodities contract. The investor has a "repurchase" agreement with the broker which provides that upon exercise of the option the broker repurchases the option from the investor and gives him his profit on the transaction. Thus, the investor never buys or sells the contract; rather, he receives cash from the broker. Some of the present so-called London options take this form. For a more detailed discussion, see Long, *The Naked Commodity Option Contract As A Security*, 15 Wm. & Mary L. Rev. 211 (1974).

The definition of "security" in G.S. 78-2(g) appears to be based in part on § 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1) (1970), which provides as follows:

"The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

The Uniform Securities Law, enacted in 28 States, is identical to § 2(1) of the Securities Act of 1933, except for oil, gas,

Commodities International, Inc. v. Eure, Sec. of State

and mineral interests and an exclusion of insurance and annuity contracts. Uniform Securities Act, § 401(1)(3) (1956). The similarity of these statutes to G.S. 78-2(g) dictates our reliance on the decisions of the State and Federal Courts in interpreting them.

The characterization of commodity futures contracts and commodity options as securities has never been presented to the appellate courts of this State. In reviewing the Federal decisions and the decisions of the courts of states with statutes similar to G.S. 78-2(g), we note the significance that those courts have placed on the features that distinguish naked options from London options; *i.e.*, that the investor in a naked option never buys or sells the contract, that he receives cash from the broker representing his profit, and that his profit comes from the return on premium dollars in the hands of the broker, rather than from the purchase or sale of an actual futures contract. The courts have also placed considerable emphasis on the fact that the naked option is often directed at the unsophisticated investor who seeks a large profit and wishes to take a passive role. See, for example, *King Commodity Company of Texas, Inc. v. Texas*, *supra*; *S.E.C. v. W. J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946) (defining "investment contracts"); *International Commodity Trust, Inc. v. Fisher*, 3 Blue Sky Law Rep. ¶ 71,075 (Okla., Dist. Ct., Okla. County, 14 May 1973); *Shaprio v. First Federated Commodity Trust Co.*, 3 Blue Sky Law Rep. ¶ 71,071 (Md. Cir. Ct., Baltimore County, 30 May 1973); *People v. Puts & Callo, Inc.*, 3 Blue Sky Law Rep. ¶ 71,090 (Cal. Super. Ct., L.A. County, 21 June 1973).

For the proposition that futures contracts *per se* are not securities, see *McCurnin v. Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972); *Schwartz v. Bache & Co.*, 340 F. Supp. 995 (S.D. Iowa 1972); *Sinva v. Merrill, Lynch, Pierce, Fenner & Smith*, 253 F. Supp. 359 (S.D. N.Y. 1966).

[4] One commentator has taken the position that for purposes of the Federal Securities Law, futures contracts will not, by themselves, be treated as securities. Further, he concludes that options to buy futures contracts will not be held to be securities within the meaning of the Securities Act of 1933, the Securities Exchange Act of 1934, or similar State legislation unless the characteristics of a naked option are shown to exist. Long, *supra*. We, therefore, deem it essential that the trial court have before

Strickland v. Contractors, Inc.

it evidence of the mechanics of the commodity options in order to rule on whether the options are securities.

The trial court could properly have taken judicial notice of the mechanics of the true London options, since they are "capable of demonstration by resort to readily accessible sources of indisputable accuracy." 3 Strong, N. C. Index 2d, Evidence, § 3. However, the trial court could not have taken notice—absent evidence—of the operation of the particular options being sold by plaintiff. The court made the following finding of fact:

"2. The premiums paid to plaintiff by purchasers of London Options are prices paid for the rights to the future acquisition of contracts for future delivery of commodities upon presently specified terms with prospect of gain to the payor-purchaser arising from exercise of the options under favorable commodities market conditions and not from the use of the premium."

This finding is not supported by competent evidence. As we have hereinabove stated, the court had before it only the stipulations of the parties. The record before us lacks sufficient evidence for the determination of whether the securities being sold by plaintiff are securities within the meaning of G.S. 78-2(g). The cause is remanded for hearing.

Remanded.

Judges HEDRICK and BALEY concur.

JAMES A. STRICKLAND t/a STRICKLAND STONE CONTRACTOR v.
GENERAL BUILDING AND MASONRY CONTRACTORS, INC.,
KING'S ROW, INC., JOHN G. WHICHARD AND MARY K.
WHICHARD

No. 7410DC319

(Filed 21 August 1974)

Laborers' and Materialmen's Liens § 6— time of filing— lien invalid

Where plaintiff filed notice and claim of lien against defendants on 27 July 1973 for labor and materials used in stonework on defendants' property, and the claim stated that materials were last furnished upon the property on 28 March 1973, plaintiff thereby indicated his failure to file the claim within 120 days after the last furnishing of

Strickland v. Contractors, Inc.

labor and materials as required by G.S. 44A-12(b), and the lien is therefore invalid.

Judge BAILEY dissenting.

APPEAL by defendants King's Row, Inc., John G. Whichard and Mary K. Whichard from *Barnette, Judge*, 12 November 1973 Session of District Court held in WAKE County.

This is an action to enforce a lien for labor and materials furnished.

Plaintiff has three counts in his complaint. In the first count he alleged that he entered a contract with defendant General Building and Masonry Contractors, Inc., to perform certain stonework on real property owned by defendant King's Row, Inc.; that he performed this work in accordance with the contract, completing it on 28 March 1973, and was due the sum of \$2,141.25. The second count alleged that General Building was the agent for King's Row and that King's Row had thereby contracted with plaintiff for the stonework. The third count alleged that King's Row had conveyed the property to defendants John G. and Mary K. Whichard and that defendants General Building and King's Row had been acting as the agents of the Whichards in contracting with plaintiff for the stonework. All of the defendants have refused to make payment to plaintiff for the work performed. In his prayer for relief, plaintiff requested that he be granted judgment for \$2,141.25; that the judgment be declared a specific lien on the property; and that the property be sold to satisfy the judgment.

Notice and claim of lien against all defendants was filed by plaintiff on 27 July 1973. The notice stated in part:

"5. The material was first furnished upon said property in February 1973 and was last furnished upon said property on March 28, 1973."

On 4 October 1973 plaintiff moved to amend his complaint so as to allege that the work was completed on 3 April 1973 rather than 28 March 1973. On 10 October defendants moved to cancel and remove plaintiff's notice of lien on the ground that it was not filed within 120 days after the last furnishing of labor or materials, as required by G.S. 44A-12(b). (27 July 1973 was 121 days after 28 March 1973.) The District Court entered an order granting plaintiff's motion to amend his complaint and denying defendants' motion to cancel the notice of lien. Defendants appealed to this Court.

Strickland v. Contractors, Inc.

Robert A. Hassell for plaintiff appellee.

Reynolds and Russell, by E. Cader Howard, for defendant appellants King's Row, Inc., John G. Whichard and Mary K. Whichard.

MORRIS, Judge.

Defendants present two questions for our determination. First, they contend that plaintiff's notice of lien is invalid because it fails to specify the exact date of the first furnishing of labor and materials. Plaintiff's notice states only that the stonework was last furnished "in February 1973". However, we do not deem it necessary to discuss this contention inasmuch as our treatment of the second contention is dispositive of the appeal.

Defendants next contend that plaintiff's lien is invalid because the notice and claim of lien was not filed within 120 days after the last furnishing of labor and materials as required by G.S. 44A-12(b). This contention is based upon the statement of plaintiff in the claim of lien that materials were last furnished upon the property on 28 March 1973. Since 28 March 1973 is more than 120 days prior to 27 July 1973 when the claim was filed, defendants argue that the lien itself was void.

G.S. 44A-12(b) provides as follows:

"Time of Filing.—Claims of lien may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien."

Although the statute clearly requires that the lien be filed within 120 days after the last furnishing of labor or materials, there is no requirement that a mechanic, laborer, or materialman state in his claim of lien the date of the last furnishing. Plaintiff has, therefore, placed in his claim of lien information not required by the statute. However, if we were to treat this information as a mere surplusage, we would do injury to the purpose of the lien statute.

It is well established that a lien is lost if the steps required to perfect it are not taken in the same manner and within the time prescribed by law. *Priddy v. Lumber Co.*, 258 N.C. 653, 129 S.E. 2d 256 (1963) [a suit between a holder of a deed of

Strickland v. Contractors, Inc.

trust and a lienor-judgment creditor to establish the priority of their liens]. Although the claim of lien filed by plaintiff contains information not required by the statute, it reveals on its face that it was filed more than 120 days after the stonework was last furnished by plaintiff. Thus all potential purchasers or lenders interested in the subject property and relying on the public record would be advised that the claim of lien had not been filed in accordance with the statute, and was not enforceable against the property. To require the title examiner to go outside the public record to discover that the stonework was in fact—as plaintiff claims—completed less than 120 days prior to the filing would in our opinion impose an undue burden on the title examiner and would damage the principle of reliance upon the public record.

We, therefore, hold that the trial court erred in denying defendants' motion to cancel the notice of lien. Plaintiff has, by his own hand, placed on the public record information asserting that he has failed to comply with the Mechanics', Laborers' and Materialmen's Lien statute. The lien itself is, therefore, invalid, and plaintiff may not enforce it against the property in question.

Reversed.

Judge HEDRICK concurs.

Judge BALEY dissents.

Judge BALEY dissenting.

I interpret G.S. 44A-12(b) as meaning that the filing time relates to the time *when the materials were last furnished*, not to the time when claimant *said* they were last furnished. There is no provision in the lien statute which requires any claimant of lien to set out in his claim the date upon which materials or labor were last furnished. There is no requirement that the public be given notice of the last date materials were furnished, and an examiner of public records ordinarily would not be apprised of this date. If the statement of the claimant be controlling, it is conceivable that a claimant could make a false statement about the date when materials were last furnished in order to enlarge the time for filing lien. Claimant can neither enlarge nor reduce the statutory period by an error in stating

Strickland v. Contractors, Inc.

the time when materials were last furnished. When the case comes on for trial plaintiff must prove that his claim of lien was filed within the statutory period from the time the materials were last furnished in order to establish his lien.

Lien statutes are designed to give the laborer or materialman a specific claim upon the property which has received benefit from his labor and materials. The purpose of recordation is to provide notice to prospective purchasers of the property or creditors that there is an encumbrance on the property and protect claimant in the enforcement of his lien. The recording statute requires that the claim of lien must be filed in apt time, but when the statute does not require that the date when materials are last furnished be specified in the notice of claim, neither the record examiner nor the court can place absolute reliance on the accuracy of a date which has been voluntarily furnished by claimant in determining if the claim is filed within the statutory limits. The claim must be treated as if it did not contain a statement of the specific date upon which materials were last furnished.

While in North Carolina this precise question does not appear to have been determined, courts of other states have held in several cases that a notice of lien which appears on its face to be untimely filed is not automatically void. *Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co.*, 13 Colo. App. 455, 59 P. 83 (1899); *Empire State Surety Co. v. City of Des Moines*, 152 Iowa 531, 131 N.W. 870 (1911); *Knowlton v. Gibbons*, 210 Mich. 547, 178 N.W. 63 (1920); *Phelan v. Cheyenne Brick Co.*, 26 Wyo. 493, 188 P. 354 (1920).

The second contention of defendants is that plaintiff's notice of lien is invalid because it fails to specify the exact date of the month when labor or materials were first furnished. Such failure does not prevent an examiner of public records from discovering the existence of the lien. It may, however, make it impossible for the record searcher to determine whether plaintiff's lien has priority over other liens attaching to the same property. Priority among laborers' and materialmen's liens is determined by the date of first furnishing. G.S. 44A-10.

Since plaintiff has made it impossible for the record searcher to determine when he first furnished labor or materials, other than that it occurred in February 1973, his lien should be deemed to relate back only to the last day of the month. Ambi-

Chavis v. Reynolds

guities in a document should be resolved against the person who drafted the document. *Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E. 2d 473; *Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829; *Trust Co. v. Medford*, 258 N.C. 146, 128 S.E. 2d 141. This step is sufficient to remedy the problems created by plaintiff's failure to specify the exact date of first furnishing, and it is unnecessary to resort to the harsher remedy of cancelling plaintiff's notice and invalidating his lien.

My vote is to affirm the judgment of the trial court.

LEE D. CHAVIS v. HOBSON R. REYNOLDS

No. 746DC81

(Filed 21 August 1974)

Agriculture § 12— tobacco allotment — no power to convey — contract unenforceable

Directed verdict for defendant on the ground that the contract sued upon was legally unenforceable should have been allowed where there was no evidence of circumstances under which by the controlling federal law and regulations defendant had the lawful power to transfer to plaintiff or plaintiff had the legal right to receive from defendant the flue-cured tobacco allotment in question.

APPEAL by defendant from *Gay, District Judge*, 20 August 1973 Session of District Court held in HERTFORD County.

Civil action to enforce specific performance of a contract to convey a flue-cured tobacco allotment or in the alternative to recover its reasonable market value alleged to be in amount of \$5,000.00.

In the spring of 1971 and for many years prior thereto defendant owned two farms in Hertford County, N. C., one designated as No. 2392 and the other as No. 2569 in the county office of the Agriculture Stabilization and Conservation Service. In his complaint plaintiff alleged that in 1971 defendant entered into an agreement with plaintiff's brother, who was acting as plaintiff's agent, to sell Farm No. 2392 with all of its crop allotments, together also with the tobacco allotments on Farm No. 2569, "which had been proportionately combined in the Hertford County A.S.C. office with Farm No. 2392 tobacco allotment"; that plaintiff paid his agent and his agent in turn paid defendant

Chavis v. Reynolds

the agreed purchase price, and by deed dated 5 May 1971 defendant conveyed Farm No. 2392 to plaintiff's agent who in turn by deed dated 10 May 1971 conveyed said property to plaintiff, but after demand defendant refused to execute the necessary documents to transfer the tobacco allotments from Farm No. 2569 to Farm No. 2392. Defendant admitted executing the deed conveying Farm No. 2392 to plaintiff's brother, but denied making any contract with plaintiff's brother or with plaintiff to transfer in any manner any tobacco allotments allocated to Farm 2569, and pled that any such contract would be void and unenforceable under Federal statutes.

At the trial defendant's motions for a directed verdict, made at the close of plaintiff's evidence and at the close of all evidence, were denied. The jury returned verdict finding that defendant had contracted to convey the tobacco allotments from Farm No. 2569 and that plaintiff should recover damages in the amount of \$1,200.00 and use of tobacco allotment on Farm 2569." The district judge entered judgment on the verdict that plaintiff recover \$1,200.00 from defendant and ordered defendant to execute necessary "A.S.C. forms in the Hertford County A.S.C. office to transfer the use and benefit of all tobacco allotments on Farm No. 2569 to the plaintiff, Lee D. Chavis, perpetually."

Defendant appealed, assigning among other errors the denial of his motions for a directed verdict.

Cherry, Cherry & Flythe by Joseph J. Flythe and Ernie Evans for plaintiff appellee.

Carter W. Jones by C. Roland Krueger for defendant appellant.

PARKER, Judge.

The motions for directed verdict should have been allowed. Federal marketing quotas for tobacco are controlled by Part 1 of Section B, Subchapter II, of the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C. § 1311, et seq. This Act provides that farm marketing quotas for tobacco "may be transferred only in such manner and subject to such conditions as the Secretary [of Agriculture] may prescribe by regulations." 7 U.S.C. § 1313(d). Pursuant to this statutory authority, the United States Secretary of Agriculture issued regulations governing transfer of farm marketing quotas for flue-cured tobacco. These

Chavis v. Reynolds

regulations expressly provide that "[t]here shall be no transfer of farm marketing quotas [for flue-cured tobacco] except as provided in §§ 725.72, 725.76, and Part 719 of this chapter." 7 C.F.R. § 725.74. The first of the sections referred to, § 725.72, provides that under certain circumstances farm marketing quota allotments for flue-cured tobacco may be transferred by lease, but subsection (b) of that section expressly provides that any such lease for 1971 and subsequent crops may be made for a "term of years not to exceed five," and no provision is made in § 725.72 for the permanent transfer of any such allotment from one farm to another. The second of the sections referred to, § 725.76, deals with the transfer of tobacco farm acreage allotments "for farms affected by a natural disaster," and clearly has no application to the facts of the present case. The third portion of the regulations referred to, Part 719 of Chapter VII, is entitled "Reconstitution of Farms, Allotments, and Bases" and sets forth the circumstances under which the combination or division of farm acreage may be reflected in the reallocation of crop quotas. Here again, however, the evidence in the present case fails to show circumstances which would permit the flue-cured tobacco quota allotment of Farm No. 2569 to accompany conveyance of the fee and the crop quotas of Farm No. 2392. In his complaint plaintiff alleged that the tobacco allotments on Farm No. 2569 "had been proportionately combined in the Hertford County A.S.C. office with Farm No. 2392 tobacco allotment," but his proof failed to show this. Indeed, plaintiff's own witness, William S. Early, Executive Director of the Hertford County A.S.C.S. office, testified exactly to the contrary. Thus, the evidence in the present case, even when considered in the light most favorable to plaintiff, fails to disclose circumstances under which by the controlling Federal law and regulations defendant had the lawful power to transfer to plaintiff or plaintiff had the legal right to receive from defendant the flue-cured tobacco allotment here in question. Directed verdict for defendant on the ground that the contract sued upon was legally unenforceable should have been allowed.

While we rest our decision on the basis above referred to, we also note that a close question is presented whether the evidence was sufficient to go to the jury on the issue whether any such contract as alleged by plaintiff was in fact made. To establish the contract plaintiff relied primarily on certain notations on the checks by which plaintiff's brother paid defendant the purchase price for the Farm No. 2392 which was conveyed, but

Chavis v. Reynolds

all of the evidence seems to indicate that plaintiff was an undisclosed principal in that transaction, and both defendant and plaintiff's brother, the only two persons directly and personally involved, testified that prior to closing they learned that the flue-cured tobacco allotment on the farm retained by defendant, No. 2569, could not be legally transferred and they closed the transaction on that basis. For example, plaintiff's brother testified: "I did not buy the tobacco allotment because it could not be sold."

Defendant properly and in apt time made his motions for a directed verdict, but the record fails to show that any motion for judgment notwithstanding the verdict was made in accordance with G.S. 1A-1, Rule 50 (b) (1) nor did the judge following the verdict on his own motion grant, deny, or redeny the motion for directed verdict made at the close of all the evidence. G.S. 1A-1, Rule 50(b) (2) provides:

"(2) An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment in accordance with Rule 50(b) (1) or the trial judge on his own motion granted, denied or redened the motion for a directed verdict in accordance with Rule 50(b) (1)."

Therefore, although we find that the trial judge should have granted defendant's motion for directed verdict made at the close of all the evidence, we may not direct entry in accordance with the motion. The judgment appealed from is vacated and the case is remanded to the District Court in Hertford County for entry of judgment dismissing the action without prejudice to plaintiff's right to institute a new action within six months after such dismissal.

Vacated and remanded.

Chief Judge BROCK and Judge BAILEY concur.

State v. Hart

STATE OF NORTH CAROLINA v. DILLARD P. HART AND DREWRY
HALL

No. 7415SC514

(Filed 21 August 1974)

**Obscenity; Statutes § 10— dissemination of obscenity — favorable change
in statute — applicability**

Where defendants were convicted of dissemination of obscene materials, but the statute under which they were convicted was amended prior to determination of their appeal by the Court of Appeals, defendants were entitled to application of the favorable change in the statute which required a civil determination of the obscene nature of materials prior to the arrest of an individual for their dissemination. G.S. 14-190.2(h).

APPEAL from *Clark, Judge*, 21 January 1974 Session of ALAMANCE County Superior Court. Heard in the Court of Appeals 20 June 1974.

Defendants were charged in separate warrants with the unlawful and wilful dissemination of obscene materials in the Swinger's Book Store in Burlington in violation of G.S. 14-190.1(a). Defendant Hart was arrested 1 February 1973 for the sale of a book entitled *Communal Sex*, and defendant Hall was arrested 18 December 1972 for the sale of a book entitled *Group Sex*.

Both defendants pleaded not guilty and were convicted in separate trials in District Court. Both defendants appealed to the Superior Court for a trial de novo.

Upon trial de novo, both defendants moved that the cases be dismissed on the ground that G.S. 14-190.1(a) had not been construed by the appellate courts of this State in accordance with the holding of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973). When the motions were denied, defendants stipulated that there were "no matters of fact in dispute" and entered pleas of guilty "assuming that the statute is valid and constitutional." Defendants appealed from judgments imposing sentence, and since there is no right of appeal to this Court from pleas of guilty, G.S. 15-180.2, we treated this appeal as a petition for writ of certiorari which we granted.

State v. Hart

Attorney General Morgan, by Assistant Attorney General Speas, for the State.

Harriss & Ruis, by Ronald H. Ruis, for defendant appellants.

MORRIS, Judge.

As we have noted, defendants Hall and Hart were arrested on 18 December 1972 and 1 February 1973 respectively. They were convicted in District Court on 31 January 1973 and 15 March 1973 respectively, and entered guilty pleas in Superior Court on 28 January 1974.

At the time of their arrest the anti-obscenity statute, G.S. 14-190.1 et seq. contained no requirement of a civil determination of the obscene nature of materials prior to the arrest of an individual for their dissemination. On 13 April 1974, the General Assembly ratified Senate Bill 1059 amending G.S. 14-190.2(h) as follows:

“(h) No person, firm, or corporation shall be arrested or indicted for any violation of a provision of G.S. 14-190.1, G.S. 14-190.3, G.S. 14-190.4, G.S. 14-190.5, G.S. 14-190.6, G.S. 14-190.7, G.S. 14-190.8, G.S. 14-190.10 or G.S. 14-190.11 until the material involved has first been the subject of an adversary determination under the provisions of this section, wherein such person, firm or corporation is a respondent, and wherein such material has been declared by the court to be obscene or in the case of G.S. 14-190.10 or G.S. 14-190.11, to be sexually oriented and until such person, firm or corporation continues, subsequent to such determination, to engage in the conduct prohibited by a provision of the sections hereinabove set forth.” 1973 Session Laws, Ch. 1434, § 5.

This law became effective 1 July 1974, prior to the date defendants' appeal was determined by this Court. This appeal, therefore, presents us with the issue whether a favorable change in the applicable statutes inures to the benefit of defendants, the change having occurred subsequent to the offense and conviction, but prior to an appellate review of the trial. We hold that it does.

It is unquestionably the law in this State that where there is an express repeal of a statute after the commission of a

State v. Hart

crime, but prior to final judgment, no punishment can be imposed under the provisions of the repealed statute. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). This result obtains even though the repeal occurs after conviction but while appeal is pending. *Id.* It has long been the law that there can be no final judgment as long as the case is pending appeal, and a criminal action abates when the applicable statute is repealed. *State v. Nutt*, 61 N.C. 20 (1866); *State v. Williams*, 97 N.C. 455, 2 S.E. 55 (1887).

Defendants concede that G.S. 14-190.1(a) is not repealed by the General Assembly. They contend, nevertheless, that an amendment or revision of a statute requires the abatement of a prosecution where the prosecution could not have been initiated under the new statute. We think there is merit to this position.

In *State v. Pardon*, 272 N.C. 72, 157 S.E. 2d 698 (1967), defendant was convicted of public drunkenness. While his case was on appeal, the applicable statute was rewritten, but not repealed. The punishment for the offense was reduced. The Supreme Court, per Justice Sharp, held

“Since the judgment is not final pending appeal, ‘the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered.’ *Gulf, Col. & S. F. Ry. v. Dennis*, 224 U.S. 503, 506, 56 L.Ed. 860, 861, 32 S.Ct. 542, 543.” *Id.* at 76.

In addition to lessening the maximum punishment, the amendment added chronic alcoholism as an affirmative defense to public drunkenness. The Court held that defendant was entitled to the benefit of the change in the law which would allow him to prove that his conduct was not criminal.

Similarly, the Supreme Court in *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), held that an amendment to a traffic law was available to a defendant whose appeal was pending when the amendment became effective.

In *State v. Cobb*, 284 N.C. 573, 201 S.E. 2d 878 (1974), defendant appealed his conviction for possession of a firearm in violation of G.S. 14-415.1, which at the time of conviction forbade a convicted felon to possess a firearm. While Cobb’s appeal was pending, G.S. 14-415.2 became effective and provided that every inmate, upon his unconditional discharge from the Department

Howell v. Nichols

of Corrections, shall have his citizenship restored and shall be exempt from the provisions of G.S. 14-415.1. Defendant was held entitled to the benefit of the amendment, and his conviction was reversed and remanded with directions to arrest judgment.

The State contends that the General Assembly clearly intended that the requirement of an adversary determination of obscenity, before arrest or indictment, be prospective only. The State points to no language in the statute to this effect; rather, they contend that if the legislature had intended retroactivity they would have made the amendment effective upon ratification. There is no merit to this argument. Appellate courts must give effect to a statutory amendment effective during prosecution of an appeal unless the statute contains a saving clause or a manifest legislative intent to the contrary. *State v. Pardon, supra*. We have carefully examined the amendment to G.S. 14-190.2(h), and we find neither a saving clause nor manifest legislative intent that the operation of the statute be prospective only.

The case against defendants could not be brought by the State on this date, because there has been no adversary hearing to determine that the publications involved are obscene. Since the statute under which defendants were convicted was amended prior to a final judgment in their cases, we must give them the benefit of that amendment. On the authority of the cases cited above, we hold that the actions against them have abated.

Judgment arrested.

Judges VAUGHN and BAILEY concur.

BETTY GRIGG HOWELL v. FLOYD GARFIELD NICHOLS

No. 7427SC469

(Filed 21 August 1974)

1. Damages § 13— aggravation of existing condition — future pain — future treatment — causation

In an action to recover for personal injuries received in an automobile collision wherein plaintiff's evidence tended to show that a cervical sprain suffered in the accident aggravated an existing disc condition, the trial court properly excluded a doctor's testimony that

Howell v. Nichols

pain suffered by plaintiff could be indefinite where plaintiff offered no evidence to show the degree and duration of the pain that might be expected from the disc condition absent the superimposed cervical sprain or the probable effect of the cervical sprain on the degree and duration of such pain; also, the court properly excluded the doctor's testimony that a cervical fusion might become necessary in the future where plaintiff's evidence failed to show whether the fusion might become necessary as a result of the cervical sprain or whether it might become necessary even if plaintiff had not suffered the sprain.

2. Trial § 52— refusal to set aside verdict

The trial court did not abuse its discretion in refusing to set aside a verdict of \$1500 in an action to recover for personal injuries sustained in an automobile collision.

APPEAL by plaintiff from *Snepp, Judge*, 18 February 1974 Session of Superior Court held in GASTON County. Heard in the Court of Appeals 13 June 1974.

Plaintiff seeks to recover damages for injuries resulting from a collision between her automobile and one operated by defendant.

Defendant stipulated that his negligence caused the accident. The only issue at trial was that of damages. The jury awarded plaintiff \$1,500.

Basil L. Whitener and Anne M. Lamm for plaintiff appellant.

Hollowell, Stott & Hollowell, by Grady B. Stott and James C. Windham, Jr., for defendant appellee.

MORRIS, Judge.

[1] Plaintiff contends that the court improperly excluded testimony from Dr. James A. Sanders to the effect that the pain suffered by plaintiff "could be indefinite or prolonged for an indefinite period of time." We hold that the testimony was properly excluded. The substance of Sanders' testimony is as follows. Complaining of discomfort in her neck, plaintiff came to Sanders for treatment on 7 July 1971, about three weeks after the accident. At the time, plaintiff "had limitation of motion in her neck. . . ." and indicated "discomfort over the medial border. The medial refers to toward the middle. This would be toward the inner part of the wing bone . . . the scapula. If you put your arm behind you, you'll probably just be . . . barely able to put your thumb in that area . . . X-rays were taken . . . and these

Howell v. Nichols

revealed the patient had degenerative disc disease at the third and fourth cervical interspace."

Sanders prescribed medication for pain, muscle relaxant and traction. He also advised plaintiff to use heat on her neck. During a subsequent consultation on 20 September 1971, Sanders informed plaintiff that "it might be some time before her pain would subside." On 10 July 1972, a year after his initial examination of plaintiff, Sanders again saw the patient. "At that time, [he] made a note that the degenerative disc disease was the primary cause of her discomfort, with a strain being superimposed to that." The patient was advised to continue using traction which she had been using intermittently. Regarding "the function and aim" of the traction, Sanders explained

"that traction applies a pull to the neck and in this way it tends to make the muscles in the neck relax. This is what causes most of the discomfort in a problem such as this. The muscles tend to tighten up and go into spasm and most of the pain is due to this. The residual pain that you have after getting the muscles to relax is due primarily to the disc problem."

During another examination four months later, plaintiff was informed that Sanders "thought she had had a sprain of her cervical spine superimposed upon the degenerative disc problem in her neck which she had had [several years] prior to the accident." Sanders also indicated that he "did not see objective finding to indicate permanent disability." Plaintiff's evidence thus tends to show that she suffered from degenerative disc disease before the accident occurred, that this condition may have been aggravated by a cervical sprain precipitated by the collision, that although both degenerative disc disease and a cervical sprain can cause pain, the former condition was the primary cause of plaintiff's condition. Where, as here,

"the wrongful act does not cause a diseased condition but only aggravates and increases the severity of a condition existing at the time of the injury, the injured person may recover only for such increased or augmented sufferings as are the natural and proximate result of the wrongful act, or, as otherwise stated, where a pre-existing disease is aggravated . . . the . . . recovery . . . is limited to the additional injury caused by the aggravation over and above the consequences, which the pre-existing disease, running

Howell v. Nichols

its normal course, would itself have caused if there had been no aggravation by the wrongful injury." *Potts v. Howser*, 274 N.C. 49, 54, 161 S.E. 2d 737 (1968), *quoting* 25 C.J.S., Damages, § 21, p. 661.

Plaintiff offered no evidence tending to show either the degree and duration of pain she might be expected to experience from degenerative disc disease absent the superimposed cervical spine strain or the probable effect of the spinal sprain on the degree and duration of such pain. See *Potts v. Howser*, *supra*; *Purgason v. Dillon*, 9 N.C. App. 529, 176 S.E. 2d 889 (1970). Since plaintiff's evidence does not show a reasonable certain causal relationship between the cervical spinal sprain which may have aggravated the degenerative disc condition and possible pain and suffering in the future, see *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965); *Short v. Chapman*, 261 N.C. 674, 136 S.E. 2d 40 (1964); *Johnson v. Brown*, 11 N.C. App. 323, 181 S.E. 2d 321 (1971), Sanders' testimony regarding future pain was properly excluded.

In a related challenge, plaintiff argues that Sanders should have been permitted to testify that cervical fusion was an alternative mode of treatment "to further the situation as far as Mrs. Howell is concerned," although Sanders "would not have advised it . . . because [plaintiff] did not appear to be having enough difficulty to warrant the severity of this type of treatment." The record does not indicate whether such treatment might become necessary in the future as a result of the cervical spine sprain or whether it might become necessary even if plaintiff had not suffered the sprain. Hence, the jury could not consider the possibility of future treatment in arriving at plaintiff's damages. The proffered testimony was properly excluded.

Plaintiff also contends that she should have been allowed to state how long her vehicle had been stopped at a traffic light prior to the accident, even though the manner in which the accident happened was not in issue. Since the record does not indicate what plaintiff's response would have been, this Court cannot determine whether exclusion of the testimony was prejudicial. *Gibbs v. Light Co.*, 268 N.C. 186, 150 S.E. 2d 207 (1966). The assignment of error is overruled.

[2] Plaintiff argues that the court erred in not setting aside the verdict and granting a new trial on the grounds that the damages awarded were inadequate. Plaintiff offered evidence

Carver v. Mills

of approximately \$240 special damages. The verdict was \$1,500. The record does not show that the court abused its discretion in declining to set aside the verdict and ordered a new trial.

Affirmed.

Judges VAUGHN and BAILEY concur.

WILLIAM A. CARVER v. HORACE CALVIN MILLS AND R. R. FRIDAY,
ADMINISTRATOR OF THE ESTATE OF JOE RICHARD MILLS,
DECEASED

No. 7427SC443

(Filed 21 August 1974)

Insurance § 112— medical payments — subrogation of insurer

Under the terms of an automobile liability policy, the insurer was subrogated to the rights of the insured against the tortfeasor for an amount paid to the insured under the medical payments provision of the policy and was entitled to receive such amount from the insured's recovery by consent judgment against the tortfeasor; the subrogation provision of the policy did not constitute the assignment of a personal injury claim which was void as against public policy.

APPEAL by respondent State Farm Mutual Automobile Insurance Company from *Friday, Judge*, 23 January 1974 Session of Superior Court held in GASTON County. Heard in the Court of Appeals on 12 June 1974.

On 20 April 1970 respondent, State Farm Mutual Automobile Insurance, through its agent, Herbert M. McMahan of Sevierville, Tennessee, issued automobile liability policy No. 1844-533-B22-42A to the plaintiff, William A. Carver, who was likewise from Sevierville.

On 24 January 1971 plaintiff was operating the vehicle described in said policy on a public highway in Gaston County when he was involved in a collision with an automobile owned by defendant Horace Calvin Mills and operated at the time of the accident by defendant Joe Richard Mills. The plaintiff suffered personal injuries as a result of the accident.

On 24 May 1971 respondent paid \$1,000.00 to the plaintiff pursuant to the medical payments provision of the aforemen-

Carver v. Mills

tioned insurance policy. Coterminous with this payment, the plaintiff signed a writing submitted to him by the respondent and designated as a "Loan Receipt Under Medical Payments Coverage."

On 9 August 1971 the plaintiff filed an action against Horace Calvin Mills, owner of the vehicle involved in the accident with plaintiff. On 17 April 1973 the plaintiff and defendants entered into a consent judgment by which the plaintiff was awarded \$9,000.00. Prior to this consent judgment the plaintiff and defendants had been notified by respondent of its claim to the sum of \$1,000.00 of any monies recovered by the plaintiff from the defendant's liability insurance carrier. The plaintiff denied respondent was entitled to this sum. The consent judgment, in speaking to the issue of who was entitled to the \$1,000, stated:

"It Is Further Ordered, Adjudged, And Decreed that the Clerk of Superior Court of Gaston County shall disburse from the proceeds of this settlement the sum of \$8,000.00 to the plaintiff and the remaining sum of \$1,000.00 shall be retained by the Clerk for disbursement to either the plaintiff or to State Farm Mutual Automobile Insurance Company pending further orders of the Court."

On 3 July 1973 plaintiff filed a motion in the cause praying that an order be entered requiring the Clerk to pay to plaintiff the \$1,000.00. Likewise, on 10 July 1973, respondent filed a motion in the cause requesting that an order be entered requiring payment of the \$1,000.00 to it.

The motions were heard before Judge Friday at the 17 December 1973 Session of Superior Court in Gaston County; and on 23 January 1974, Judge Friday entered an order awarding the \$1,000 to the plaintiff.

The respondent appealed.

Basil L. Whitener and Anne M. Lamm for plaintiff appellee.

Hollowell, Stott & Hollowell by James C. Windham, Jr., for respondent appellant.

HEDRICK, Judge.

The single question to be determined on this appeal is: Whether, under the terms of the insurance policy issued to

Carver v. Mills

plaintiff, the respondent insurance company is entitled to be subrogated to the rights of plaintiff in the sum of \$1,000.00, which sum represents the payment made to plaintiff pursuant to the medical payments provision of the policy. Respondent insurance company contends that the unambiguous language of the policy, plus the language of the "loan receipt agreement", clearly exemplify the fact that respondent is entitled to recoup the \$1,000 payment.

Conversely, plaintiff asserts that the trial judge correctly construed the language of the insurance contract in awarding plaintiff the \$1,000.00 and to do otherwise would be to do violence to the avowed public policy against the assignment of claims.

A careful examination of the terms of the policy discloses the following provisions which are relevant to our determination of the question presented:

"4. Subrogation. Upon payment under this policy, except under coverages C, M, S, and T, the company shall be subrogated to all the *insured's* rights of recovery thereof and the *insured* shall do whatever is necessary to secure such rights and do nothing to prejudice them.

"Upon payment under coverages C and M of this policy the company shall be subrogated to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery which the injured *person* or anyone receiving such payment may have against any *person* or organization and such *person* shall execute and deliver instrument and papers and do whatever else is necessary to secure such rights. Such *person* shall do nothing after loss to prejudice such rights.

"5. Trust Agreement—Coverages C, M, and U. In the event of payment to any *person* under coverage C, M or U:

(a) the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such *person* against any *person* or organization because of the damages which are the subject of claim made under the coverages;"

The above quoted provisions distinctly delineate the respondent insurance company's right to subrogation when medical

Carver v. Mills

payments are made to the insured pursuant to Coverage C of the policy. See, 4 Strong, N. C. Index 2d, Insurance, § 6, p. 461. Furthermore, the respondent insurance company's position is bolstered by making reference to the written agreement between the insurer and insured which is entitled "Loan Receipt Under Medical Payments Coverage". This paper writing states in pertinent part:

"The undersigned hereby acknowledges receipt from the State Farm Mutual Automobile Insurance Company of the sum of \$1,000.00 (One Thousand and No/100) as a loan without interest under Policy No. 1844593B2242A repayable only in the event and to the extent that any net recovery is made by the undersigned from any person or persons, corporation or corporations, or other parties, on account of personal injuries sustained in an accident which occurred on or about the 24 day of Jan., 1970"

Thus, the insurance company having paid \$1,000.00 to the insured under Coverage C (the medical payments coverage) of the policy and the insured having obtained a recovery of \$9,000.00 by way of a consent judgment, it follows under the provisions of the insurance contract stated *supra* that the respondent insurance company is entitled to be subrogated to the extent of \$1,000.00.

In arriving at this decision, we necessarily reject plaintiff's contention that the subrogation provision in the policy is tantamount to an assignment of a personal injury claim and as such is void as against public policy. The facts of this case plainly disclose that the respondent insurance company is simply attempting to recover a payment made in accordance with the terms of the policy. An attempt to designate this as constituting an assignment of a claim is feckless. See, *Wilson v. Tennessee Farmers Mutual Insurance Company*, 219 Tenn. 560, 411 S.W. 2d 699 (1966), where it is said:

"Subrogation means substitution, not assignment or transfer. Subrogation operates only to secure contribution and indemnity; whereas, an assignment transfers the whole claim

" * * * Generally, parties may contract as they wish and we cannot see that it is against public policy for the parties to contract for subrogation of medical payments.

Carver v. Mills

To hold otherwise would permit an injured plaintiff to recover twice for the same medical expenses. This should not be permitted."

The judgment of the trial court is

Reversed.

Judges CAMPBELL and PARKER concur.

ANALYTICAL INDEX



WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ACCOUNTS	ESTATES
AGRICULTURE	ESTOPPEL
ANIMALS	EVIDENCE
APPEAL AND ERROR	EXECUTION
ARREST AND BAIL	EXECUTORS AND ADMINISTRATORS
ARSON	FALSE IMPRISONMENT
ASSAULT AND BATTERY	FIDUCIARIES
ATTORNEY AND CLIENT	FIRES
AUTOMOBILES	FRAUD
BAILMENT	GAMBLING
BASTARDS	
BILLS AND NOTES	HIGHWAYS AND CARTWAYS
BOUNDARIES	HOMICIDE
BROKERS AND FACTORS	HOSPITALS
BURGLARY AND UNLAWFUL BREAKINGS	HUSBAND AND WIFE
CARRIERS	INDICTMENT AND WARRANT
CLERKS OF COURT	INFANTS
CONSTITUTIONAL LAW	INJUNCTIONS
CONTRACTS	INSURANCE
CORPORATIONS	
COURTS	JUDGMENTS
CRIME AGAINST NATURE	JURY
CRIMINAL LAW	
DAMAGES	LABORERS' AND MATERIALMEN'S LIENS
DEATH	LANDLORD AND TENANT
DECLARATORY JUDGMENTS	LARCENY
DEEDS	LIBEL AND SLANDER
DESCENT AND DISTRIBUTION	LIMITATION OF ACTIONS
DISORDERLY CONDUCT	LIS PENDENS
DIVORCE AND ALIMONY	
ELECTRICITY	MALICIOUS PROSECUTION
EQUITY	MASTER AND SERVANT
ESCAPE	MORTGAGES AND DEEDS OF TRUST
	MUNICIPAL CORPORATIONS

TOPICS COVERED IN THIS INDEX
(Continued)

NARCOTICS	SALES
NEGLIGENCE	SCHOOLS
NOTICE	SEALS
	SEARCHES AND SEIZURES
OBSCENITY	SPECIFIC PERFORMANCE
	STATUTES
PARENT AND CHILD	
PARTNERSHIP	TAXATION
PHYSICIANS AND SURGEONS	TELEPHONE AND TELEGRAPH
PLEADINGS	COMPANIES
PROCESS	TENANTS IN COMMON
	TORTS
QUASI-CONTRACTS	TRIAL
	TRUSTS
RAILROADS	
RAPE	UNIFORM COMMERCIAL CODE
RECEIVING STOLEN GOODS	UTILITIES COMMISSION
REFORMATION OF INSTRUMENTS	
REGISTRATION	VENDOR AND PURCHASER
ROBBERY	VENUE
RULES OF CIVIL PROCEDURE	WITNESSES

ACCOUNTS§ 1. **Open and Running Accounts**

Trial court erred in granting summary judgment to plaintiff in an action on an account in which defendant pled the statute of limitations. *Hartness v. Penny*, 75.

AGRICULTURE

§ 9. **Action or Counterclaim for Defective Fertilizer**

Statute setting forth prerequisites for suit based on defective fertilizer is not applicable to actions for breach of an express warranty of fitness of fertilizer. *Potter v. Tyndall*, 129.

§ 12. **Marketing Quotas and Cards**

Directed verdict for defendant should have been allowed where there was no evidence that defendant had the lawful power to transfer to plaintiff or plaintiff had the legal right to receive from defendant the flue-cured tobacco allotment in question. *Chavis v. Reynolds*, 734.

ANIMALS

§ 7. **Criminal Responsibility for Cruelty to Animals**

Trial court erred in excluding certain testimony concerning cruelty to dogs. *S. v. Fowler*, 144.

APPEAL AND ERROR

§ 6. **Judgments and Orders Appealable**

Appeal from adjudication of delinquency is premature where the court continued disposition until a specific date to give the court counselor an opportunity to conduct a home study. *In re Meyers*, 11.

Though there is generally no right of appeal from denial of a motion for summary judgment, defendant may appeal judge's ruling as to jurisdiction over him. *Sides v. Hospital*, 117.

§ 9. **Moot Questions**

Appeal is dismissed as moot where the statutory basis for plaintiff's case has been repealed. *Town of Wadesboro v. Holshouser*, 65.

§ 35. **Necessity for Case on Appeal**

It is not necessary that a case on appeal be served on appellee where appellant's only assignment of error relates solely to the record proper. *Brantley v. Meekins*, 683.

§ 37. **Agreement to Case on Appeal**

Appellants are not entitled to a new trial by reason of their inability to obtain a verbatim transcript of the trial. *Lachmann v. Baumann*, 160.

§ 39. **Time of Docketing**

Extension of time to docket record on appeal is not accomplished by an extension of time to serve case on appeal or by order purporting to extend time to undesignated date. *Clark v. Williams*, 341; *Melton v. Melton*, 694.

APPEAL AND ERROR—Continued

Appeal is dismissed for failure to docket the record on appeal within 90 days after the date of the judgment appealed from. Court of Appeals Rule 5. *Melton v. Melton*, 694; *Campbell v. Campbell*, 696.

§ 52. Invited Error

Attorney cannot complain of an instruction which he helped to draft. *Craver v. Insurance Co.*, 660.

§ 63. Remand

Cause is remanded where writ of certiorari was improper. *Board of Transportation v. Harrison*, 193.

ARREST AND BAIL**§ 3. Right of Officer to Arrest Without Warrant**

An officer's warrantless arrest of defendant for drunken driving was legal. *S. v. Buchanan*, 167; *S. v. Dark*, 566.

Defendant's arrest without a warrant for robbery and kidnapping was legal. *S. v. Faire*, 573.

§ 4. Territory in Which Officer May Arrest

Defendant's arrest by a city police officer outside the city limits was not illegal. *S. v. Dark*, 566.

§ 7. Right to Communicate With Friends or Counsel

Defendant was not denied his right to communicate with friends and counsel subsequent to his arrest. *S. v. Dark*, 566.

ARSON**§ 3. Competency of Evidence**

In a prosecution for the felonious burning of a store, trial court properly admitted evidence concerning the preparation of Molotov Cocktails and discovery of a glass jar and gasoline-soaked soil; testimony concerning reasons why witness did not burn another store; and testimony by a participant that he and defendant were members of AIM and had come to Robeson County to help Indians establish tribal identity. *S. v. Sargent*, 148.

ASSAULT AND BATTERY**§ 11. Indictment and Warrant**

Where defendant shot his victim three times in the front and twice in the back it was improper to have two bills of indictment and two offenses of felonious assault. *S. v. Dilldine*, 229.

§ 14. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for discharging a firearm into an occupied dwelling. *S. v. Shumate*, 174.

State's evidence was sufficient to permit a jury finding that defendant was the perpetrator of assault on an officer with a deadly weapon while the officer was in the performance of his public duties. *S. v. Littlejohn*, 305.

ASSAULT AND BATTERY—Continued

In a prosecution for assault upon a law officer while such officer was in the performance of his duties, it was not necessary for the State to offer into evidence the capias which the officer was attempting to serve on defendant when the officer was assaulted. *S. v. Hammock*, 439.

Evidence was sufficient to be submitted to the jury in a prosecution for assault on an officer while the officer was in the performance of his duties. *Ibid.*

State's evidence of identification of defendant as the perpetrator of the crime was sufficient for the jury. *S. v. Letterlough*, 681.

§ 15. Instructions Generally

Trial court did not err in failing to instruct on self-defense where defendant denied he shot the prosecuting witness. *S. v. Harding*, 66.

Trial court did not err in failing to include the term "unlawful" in its definition of assault. *Ibid.*

Trial court's instructions on intent to kill in felonious assault prosecution were erroneous. *S. v. Dilldine*, 229.

ATTORNEY AND CLIENT

§ 5. Liabilities to Client

A professional association of attorneys engaged in the practice of labor law is not liable for one attorney's misappropriation of funds given to such attorney for the purpose of investment in common stock. *Zimmerman v. Hogg & Allen*, 544.

§ 7. Compensation and Fees

Action by attorneys to recover upon a contingent fee agreement entered into during the existence of the attorney-client relationship is remanded for findings as to whether the agreement is reasonable and was fairly and freely made. *Rock v. Ballou*, 51.

Letter sent by plaintiff's attorney to the endorers of a note after the court heard the case and indicated judgment would be entered for plaintiff but some six months prior to the actual entry of judgment sufficiently complied with the requirement that notice be given of plaintiff's intention to enforce attorneys' fees provision of the note. *Trust Co. v. Larson*, 371.

AUTOMOBILES

§ 41. Children

Trial court's instruction on the duty of an automobile driver to stop for a school bus on divided four-lane highway was proper. *Holder v. Moore*, 134.

§ 46. Opinion Testimony as to Speed

Automobile passenger who saw a bicycle 100 feet away was qualified to give opinion testimony as to the speed of the automobile and of the bicycle. *Miller v. Kennedy*, 163.

Several witnesses were properly allowed to testify as to the speed of defendant's vehicle prior to the accident. *S. v. Thomas*, 206.

AUTOMOBILES — Continued

§ 50. Sufficiency of Evidence of Negligence in Operation

Trial court erred in granting defendant's motion for directed verdict where plaintiff's evidence gave rise to an inference that defendant was negligent in changing lanes. *Hill v. Jones*, 189.

§ 60. Negligence in Skidding

Trial court properly granted directed verdict for one defendant who skidded on ice and was struck by another vehicle as he was stopped in the highway, but erred in directing verdict in favor of another defendant where there was evidence that she failed to keep a proper lookout and that she was driving at a greater speed than was prudent. *Lewis v. Fowler*, 199.

§ 68. Defective Vehicles

Plaintiff passenger's evidence was sufficient for the jury on the issue of defendant driver's negligence in failing to warn him of a defective door. *Holloman v. Holloman*, 176.

§ 70. Creating Dangerous Condition on Highway

Trial court erred in directing verdict in favor of plaintiff and against the counterclaims filed against him by all defendants where the evidence tended to show that plaintiff was negligent in stopping on the highway. *Lewis v. Fowler*, 199.

§ 72. Sudden Emergency

Trial court in an automobile collision case erred in expressing an opinion in its instructions on sudden emergency. *Lawson v. Walker*, 295.

§ 83. Pedestrian's Contributory Negligence

Fourteen-year-old pedestrian was contributorily negligent as a matter of law while crossing street at point where there was no marked or unmarked crosswalk. *Brooks v. Boucher*, 676.

§ 89. Submission to Jury of Issue of Last Clear Chance

Trial court properly refused to submit issue of last clear chance in action for death of a pedestrian in *Earle v. Wyrick*, 24, and erred in failing to submit the issue in another such case in *Thacker v. Harris*, 103.

§ 90. Instructions in Auto Accident Cases

Trial court's instruction as to the duty of a pedestrian walking along the highway was proper. *Earle v. Wyrick*, 24.

Trial court's instruction on the duty of a motorist to anticipate negligence on the part of others was proper. *Holder v. Moore*, 134.

Trial court's instructions on failure to stay in the proper lane were proper in a wrongful death action. *Wyatt v. Haywood*, 267.

Trial court's charge in an automobile collision action as to whether plaintiff kept her vehicle under control, maintained a proper lookout and gave a turn signal before attempting a left turn into a driveway was proper. *Houston v. Rivens*, 423.

§ 113. Sufficiency of Evidence of Assault and Homicide

Evidence of proximate cause was insufficient for the jury in a manslaughter case. *S. v. Deese*, 1.

AUTOMOBILES — Continued

State's evidence was sufficient for the jury in a prosecution for involuntary manslaughter growing out of a head-on collision. *S. v. Thomas*, 206.

Evidence that defendant collided with an oncoming car while passing another vehicle was insufficient for the jury in involuntary manslaughter prosecution. *S. v. Plymouth*, 262.

§ 126. Competency and Relevancy of Evidence in Prosecution Under G.S. 20-138

Defendant in a drunken driving case was not prejudiced when the solicitor asked him on cross-examination whether a club to which defendant had been prior to his arrest was a "beer joint." *S. v. Holton*, 27.

Officer's testimony as to results of physical performance tests given defendant charged with drunken driving was admissible though defendant was not advised of his right to refuse the tests and no foundation was laid as to qualifications of the officer to administer the tests. *Ibid.*

Results of a breathalyzer test administered to defendant were properly admitted in a prosecution for driving under the influence. *S. v. Dark*, 566.

§ 127. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for drunken driving. *S. v. Livingston*, 346.

Defendant was not entitled to nonsuit based on alleged illegality of his warrantless arrest. *S. v. Buchanan*, 167.

BAILMENT

§ 3. Liabilities of Bailee to Bailor

Evidence was sufficient to support a finding of negligence on the part of defendant bailee who had plaintiff's car in his possession for repairs. *Norwood v. Works*, 288.

BASTARDS

§ 7. Instructions

Trial court should have taken judicial notice that a man and woman of blood group O cannot have a child of group A, and should have instructed the jury it would be their duty to return a verdict of not guilty if they believed physician's testimony and that the blood grouping tests were properly administered. *S. v. Camp*, 109.

BILLS AND NOTES

§ 4. Consideration

The seal on a promissory note imports a valuable consideration. *Ragsdale v. Kennedy*, 509.

§ 20. Sufficiency of Evidence

Evidence supported court's determination that appellant was liable on a promissory note executed to plaintiff's intestate. *Grose v. West*, 60.

BOUNDARIES

§ 14. Court Surveys

Trial court properly admitted plat made from court survey and properly permitted the witnesses to testify by referring to the plat. *Lachmann v. Baumann*, 160.

§ 15. Verdict and Judgment

Plaintiff established title to land in controversy by showing adverse possession and superior title from common source. *Lachmann v. Baumann*, 160.

BROKERS AND FACTORS

§ 4. Duties and Liabilities of Broker to Principal

Plaintiff was not entitled to specific performance of an alleged contract for the sale of real property where any agreement between plaintiff and defendant was oral and a broker who received plaintiff's check as a binder on the property was acting solely on behalf of plaintiff. *Hayman v. Ross*, 624.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence

Items connected with the break-in and larceny of a drugstore with which defendant was charged were admissible in evidence. *S. v. Averette*, 181.

§ 5. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for felonious breaking or entering of a house. *S. v. Vester*, 16.

Evidence was sufficient to be submitted to the jury in a prosecution for breaking into a hardware store. *S. v. Bell*, 348.

Evidence was sufficient to be submitted to the jury in a prosecution for breaking into a business. *S. v. Hackett*, 619.

Evidence was sufficient to be submitted to the jury in a prosecution for breaking and entering and larceny. *S. v. Marze*, 628.

§ 10. Prosecutions for Possession of Burglary Tools

Evidence was sufficient for the jury in a prosecution for possession of implements of housebreaking. *S. v. Beard*, 596.

CARRIERS

§ 9. Bills of Lading

Generally, a shipper who signs and receives a bill of lading without objection and permits the carrier to act on it by proceeding with the shipment is presumed to have assented to its terms. *Leary v. Transit Co.*, 702.

§ 10. Loss of or Injury to Goods in Transit

In an action against a common carrier to recover for loss and damage to plaintiffs' household goods, the trial court did not err in allowing into evidence defendant's tariffs, though the tariffs were not pleaded as a defense. *Leary v. Transit Co.*, 702.

CARRIERS—Continued

In an action against a carrier to recover for loss of household goods, the trial court properly refused to apply the Carmack Amendment of the Interstate Commerce Act prohibiting the limitations of liability attempted by defendant by its tariff and bill of lading. *Ibid*.

§ 12. Liability for Payment of Transportation Charges

Trial court properly entered summary judgment on the issue of liability in a quasi-contract action brought by a motor carrier to recover for shipping charges, but the court erred in entering summary judgment on the damages issue. *Freight Carriers v. Allen Co.*, 442.

CLERKS OF COURT**§ 13. Liabilities of Clerk and Surety for Loss Resulting from Failure to Perform Statutory Duty**

Action against a clerk of court based on alleged negligence in the issuance of a summons is governed by the three-year statute of limitations. *Brantley v. Meekins*, 683.

CONSTITUTIONAL LAW**§ 13. Safety, Sanitation and Health**

Summary judgment was properly entered in favor of a city in an action to recover damages for wrongful taking of plaintiff's property based on an order that plaintiffs repair or demolish certain dwellings declared unfit for habitation and on the city's demolition of certain other dwellings. *Harrell v. City of Winston-Salem*, 386.

§ 18. Rights of Free Speech and Assemblage

Disorderly conduct statute is not unconstitutionally vague under First Amendment. *S. v. Orange*, 220.

§ 27. Burdens on Interstate Commerce

Statutes and Utilities Commission rules adopted pursuant thereto requiring a public utility to obtain Commission approval before issuing any securities impose an undue burden on interstate commerce when applied to Southern Bell Telephone and Telegraph Company. *Utilities Comm. v. Telegraph Co.*, 714.

§ 30. Due Process in Trial

Superior court did not err in denial of defendant's belated motion for a free copy of the transcript of his trial in district court. *S. v. Clark*, 81; *S. v. Orange*, 220.

Trial court did not err in denying a free transcript of prior trial to an indigent defendant. *S. v. Peek*, 350.

Defendant failed to show a denial of his right to a speedy trial. *S. v. Kassouf*, 186.

Defendant was not denied his right to a speedy trial though 14 months elapsed between the offense and trial. *S. v. Roberts*, 579.

§ 31. Right of Confrontation and Access to Evidence

Defendant waived his right to be present in the courtroom at rendition of verdict by voluntarily absenting himself from the courtroom. *S. v. Billings*, 73.

CONSTITUTIONAL LAW—Continued

Trial court did not err in refusing to order disclosure of the identity of a confidential informant relied on by police in procuring a warrant to search defendant's apartment for narcotics, *S. v. Covington*, 250, or to search defendant's automobile for narcotics, *S. v. McAuliffe*, 601.

State was not required to reveal the identity of an informant who gave an officer information leading to a warrantless search of defendant's vehicle for narcotics. *S. v. Ketchie*, 637.

§ 32. Right to Counsel

Trial court did not err in hearing a motion to activate suspended sentence though nonindigent defendant was not represented by counsel. *S. v. Elliott*, 334.

Defendant was not denied his right to communicate with friends and counsel subsequent to his arrest. *S. v. Dark*, 566.

Defendant had no right to counsel at a photographic identification. *S. v. Faire*, 573.

CONTRACTS

§ 3. Definiteness and Certainty of Agreement

A paper writing between an owner of land and a developer which was made subject to "a more detailed agreement at some specific date to be agreed to by the parties hereto" was not an enforceable contract. *Boyce v. McMahan*, 254.

§ 7. Contracts in Restraint of Trade

Covenants not to compete entered into by each of the defendants when they were employed by plaintiff were founded upon adequate consideration. *Sales & Service v. Williams*, 410.

Covenants not to compete which included a territorial limitation of a 150 mile radius and a time limitation of two years were not too broad. *Ibid.*

§ 12. Construction and Operation of Contract

Provision of employment contract between plaintiff and defendant hiring plaintiff as state manager should be construed to mean that when plaintiff's loss ratio rose above 50%, his commissions should be reduced by 5% of his commissions, not 5% of the premiums. *Houser v. Insurance Co.*, 398.

§ 27. Sufficiency of Evidence and Nonsuit

Trial court properly directed verdict for defendant owner in a contractor's action to recover increased cost of installing electrical conduit rather than electrical metallic tubing to house electrical circuits in concrete floor slabs. *Electric Power v. Newspapers, Inc.*, 519.

CORPORATIONS

§ 1. Corporate Existence

Corporation's purchase of property at a foreclosure sale could not be set aside on the ground the corporation's charter had been suspended where the corporation conveyed the property to an innocent purchaser. *Parker v. Homes, Inc.*, 297.

CORPORATIONS—Continued

§ 13. Liability of Officers to Third Persons for Fraud

Fraud or unfair dealing will not be inferred in the sale of a corporation's stock by the president-manager to the directors absent a showing of special circumstances creating a fiduciary relationship. *Ragsdale v. Kennedy*, 509.

Allegations by corporate directors that the president and manager of a corporation told them the corporation was a "gold mine" were insufficient to allege active fraud by the president and manager in the sale of stock to the directors. *Ibid.*

§ 16. Corporate Securities

Action to determine whether London commodities options are "securities" is remanded for consideration by the court of the mechanics of the options. *Commodities International, Inc. v. Eure, Sec. of State*, 723.

COURTS

§ 2. Jurisdiction of Courts

The court had jurisdiction of the subject matter of claims for breach of contracts made in Florida for improvement of a house located in this State and for construction of a house in Florida. *Gibbs v. Heavlin*, 482.

CRIME AGAINST NATURE

§ 1. Elements of the Offense

Crime against nature statute is not unconstitutionally vague. *S. v. Crouse*, 47.

§ 2. Prosecutions

Defendant was not placed in double jeopardy when the State took a nolle prosequi with leave in a rape case and defendant was tried for sodomy growing out of the same occurrence. *S. v. Crouse*, 47.

Trial court's instruction on his understanding of the First Book of Moses was not prejudicial error. *Ibid.*

CRIMINAL LAW

§ 5. Mental Capacity in General

Defendant was not prejudiced by the admission of medical testimony as to his ability to distinguish between right and wrong at the time of the trial. *S. v. Propst*, 548.

§ 6. Mental Capacity as Affected by Intoxication

Trial court properly charged the jury that defendant's intoxication had no bearing upon his guilt or innocence of the lesser included offenses in the charge of first degree murder. *S. v. Cummings*, 452.

§ 9. Aiders and Abettors

Defendant who entered into a plan to rob a storeowner was a party to the breaking and entering and larceny of the store though he was at the home of the storeowner when the offenses were committed. *S. v. Wright*, 428.

CRIMINAL LAW—Continued

§ 11. Accessories After the Fact

State's evidence was sufficient for the jury on the issue of defendant's guilt of accessory after the fact of involuntary manslaughter. *S. v. Hicks*, 554.

§ 15. Venue

Trial court properly denied defendant's motion for change of venue based on newspaper articles. *S. v. Logan*, 55.

§ 18. Jurisdiction on Appeals to Superior Court

Where the district court judgment erroneously cited the wrong statute, defendant was not prejudiced by failure of superior court to remand the case for proper judgment. *S. v. Clark*, 81.

§ 21. Preliminary Proceedings

The district court judge who determines probable cause when a 14-year-old is charged with a felony is not required to support his determination of probable cause by detailed findings of fact. *In re Bullard*, 245.

§ 23. Plea of Guilty

Defendant was not prejudiced by failure of the trial court to warn the jury with respect to a change of plea by co-defendant. *S. v. Beard*, 596.

§ 26. Plea of Former Jeopardy

Defendant was not placed in double jeopardy when the State took a nolle prosequi with leave in a rape case and defendant was tried for sodomy growing out of the same occurrence. *S. v. Crouse*, 47.

Where defendant was charged with three felonies and felony murder and convicted of all except the felony murder, there was no merger of the felonies into the felony murder. *S. v. Glenn*, 6.

Defendant was not placed in double jeopardy by his conviction for both possession and sale of the same heroin. *S. v. Brinkley*, 339.

Where the district court held a preliminary hearing to determine there was probable cause and transferred the case to superior court, juvenile defendant was not subjected to double jeopardy by being tried in superior court. *In re Bullard*, 245.

§ 29. Suggestion of Mental Incapacity to Plead

Trial court's determination that defendant had sufficient mental capacity to plead to the bill of indictment was supported by the evidence. *S. v. Propst*, 548.

Record did not show defendant lacked mental capacity to stand trial because of a drinking problem. *S. v. Tillman*, 688.

§ 31. Judicial Notice

Trial court should have taken judicial notice that men and women of blood group O cannot have a child of group A. *S. v. Camp*, 109.

§ 34. Evidence of Defendant's Guilt of Other Offenses

In a prosecution for distribution of drugs, officer was properly allowed to testify about prior drug transactions he had had with defendant. *S. v. Logan*, 55.

CRIMINAL LAW—Continued

Evidence in common law robbery case that defendant was arrested for carrying a concealed weapon was harmless error. *S. v. Johnson*, 183.

§ 42. Articles Connected With the Crime

Chain of custody of bags of vegetable matter allegedly taken from defendant's car was sufficiently shown by the State to permit their admission in evidence. *S. v. Stalls*, 265.

§ 50. Opinion Testimony

Use of the word "trying" by two witnesses did not amount to expressions of opinions by the witnesses. *S. v. Orange*, 220.

§ 55. Blood Tests

Trial court should have taken judicial notice that men and women of blood group O cannot have a child of group A. *S. v. Camp*, 109.

§ 64. Evidence as to Intoxication

Defendant was not prejudiced by the opinion testimony of an officer as to intoxication of defendant. *S. v. Buchanan*, 167.

Officer's testimony as to results of physical performance tests given defendant charged with drunken driving was admissible though defendant was not advised of his right to refuse the tests and no foundation was laid as to qualifications of the officer to administer the tests. *S. v. Holton*, 27.

Admission of testimony as to defendant's sobriety by a witness who did not have sufficient opportunity to observe defendant was harmless error. *S. v. Cummings*, 452.

§ 66. Evidence of Identity by Sight

In-court identification of defendant was of independent origin and not tainted by a pretrial showup or by identification of defendant in an automobile used in the crime, *S. v. White*, 123; or by identification of defendant in a hospital emergency room, *S. v. Johnson*, 183.

Failure of trial court to make findings on voir dire did not render in-court identification of defendant improper. *S. v. Russell*, 156.

Trial court did not err in refusing to permit a detective to testify that the victim had picked out the wrong man in a lineup. *S. v. Burton*, 559.

Trial court properly admitted taxi driver's in-court identification of defendant as the person who robbed and kidnapped her. *S. v. Faire*, 573.

Photographic identification procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. *Ibid.*

Defendant had no right to counsel at a photographic identification. *Ibid.*

Victim's accidental confrontation with defendant at the police station did not taint the victim's in-court identification. *Ibid.*

Trial court's findings upon voir dire to determine admissibility of identification testimony were sufficiently specific. *S. v. Collins*, 590.

§ 75. Voluntariness of Confession and Admissibility

Confessions were not rendered involuntary by the fact they may have been made with hope that bond would be reduced or in the belief that

CRIMINAL LAW—Continued

another participant in the crime had implicated defendants. *S. v. Canady*, 53.

Statements made by defendant in response to an officer's questions while the officer was filling out an "alcoholic influence report form" after defendant had been placed under arrest and was sitting in a patrol car were the result of custodial interrogation and defendant was entitled to Miranda warnings. *S. v. Blakely*, 337.

Defendant was not subjected to custodial interrogation and was not entitled to Miranda warnings when highway patrolmen investigating an automobile collision questioned defendant in a hospital emergency room for the purpose of obtaining information to fill out an accident report. *S. v. Thomas*, 206.

Where defendant was placed under arrest for drunken driving and transported to the police station, interrogation of defendant at the police station constituted an in-custody interrogation requiring Miranda warnings. *S. v. Pollock*, 214.

Where defendant failed to object at trial to the admission of statements made by him to an arresting officer, he cannot upon appeal raise the issue that the court erred in failing to hold a voir dire. *S. v. Harrington*, 473.

It was permissible for a law officer to refer to a memorandum for the purpose of refreshing his recollection as to in-custody statements made by defendant. *S. v. Greenlee*, 489.

Defendant's in-custody statements were properly admitted in evidence. *S. v. Page*, 435.

Miranda warnings were not required for admission of testimony that defendant said "Thank you" when a police officer handed defendant a hat found at a robbery scene. *S. v. Burton*, 559.

§ 76. Determination and Effect of Admissibility of Confession

Where defendant in a drunken driving case entered a general objection to the admission of incriminating statements made by him during in-custody interrogation, the trial court erred in failing to conduct a *voir dire* to ascertain whether defendant had been given the Miranda warnings. *S. v. Pollock*, 214.

§ 77. Admissions and Declarations

Trial court was not required to conduct a voir dire to determine voluntariness of a witness's statement to defendant's attorney. *S. v. Hackett*, 619.

§ 80. Books, Records and Private Writings

Trial court properly denied defendant's motion to be allowed to see the report of a witness which had been reduced to writing by the police. *S. v. White*, 123.

Trial court properly allowed a doctor to read clinical notes into evidence although the person who had prepared the notes was not available as a witness. *S. v. Propst*, 548.

Testimony of a witness from notes as to what the estranged wife of one defendant had told him did not prejudice other defendants. *S. v. Collins*, 590.

CRIMINAL LAW—Continued

§ 84. Evidence Obtained by Unlawful Means

Items taken from defendant's car without a warrant were admissible since the items were in plain view. *S. v. Russell*, 156.

Trial court properly allowed the State to prove the contents of a lost warrant by photostatic copy of the original made by a deputy clerk of superior court. *S. v. Edwards*, 535.

Search of a vehicle in which defendant was riding was not illegal where defendant and a co-defendant consented to the search. *S. v. Beard*, 596.

§ 85. Character Evidence Relating to Defendant

Trial court erred in permitting police officers to testify as to defendant's reputation among a small group of narcotics users, to list specific acts of misconduct, and to state a personal opinion as to whether defendant's character was good or bad. *S. v. Watson*, 540.

§ 86. Credibility of Defendant

Cross-examination of defendant as to past violations of the narcotic laws was proper. *S. v. Blackwelder*, 18.

Defendant failed to show prejudice in the court's allowing the solicitor to question defendant about prior convictions without determining whether defendant was represented by counsel at the time of the convictions. *S. v. Crouse*, 47.

Solicitor properly asked defendant whether he had committed specified criminal acts for which defendant was under indictment. *S. v. Logan*, 55.

Defendant could properly be examined as to past offenses. *S. v. Richardson*, 355.

§ 87. Direct Examination of Witnesses

Solicitor was properly allowed to ask leading questions of the seven-year-old prosecutrix. *S. v. Crouse*, 47.

Court properly allowed solicitor to ask leading questions. *S. v. Thompson*, 178; *S. v. Stalls*, 265; *S. v. Collins*, 590.

§ 88. Cross-Examination

Trial court did not err in allowing the solicitor to ask defendant on cross-examination why he did not subpoena certain witnesses. *S. v. Carver*, 674.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

Trial court did not err in allowing the solicitor to question the State's witnesses as to whether they had been charged with making a fraudulent insurance claim growing out of the same accident involving defendant. *S. v. Walker*, 291.

Prior inconsistent statement made by a witness at the preliminary hearing was inadmissible where the witness testified only during a voir dire hearing and not before the jury. *S. v. Stalls*, 265.

The solicitor was properly allowed to ask defendant's witness whether he had been "charged, tried and convicted" of certain crimes. *S. v. Cummings*, 452.

CRIMINAL LAW—Continued

Defendant was prejudiced by the trial court's exclusion of a prior inconsistent statement made by a witness to defendant's attorney. *S. v. Hackett*, 619.

Trial court in a homicide and armed robbery case did not err in allowing the solicitor to question a witness of defendant with respect to the witness's possession of marijuana. *S. v. Curtis*, 606.

§ 90. Rule that Party May Not Discredit Own Witness

Trial court properly allowed the State to examine its own witness as a hostile witness. *S. v. Leonard*, 63.

§ 92. Consolidation of Counts

Where cases against a husband and wife were consolidated for trial, husband was not prejudiced by dismissal of the charges against the wife. *S. v. McAuliffe*, 601.

Defendants failed to show harm resulting from consolidation of their cases. *S. v. Frinks*, 584.

Trial court properly consolidated for trial misdemeanor larceny charge with felony charges of kidnapping and rape. *S. v. White*, 123.

§ 95. Admission of Evidence Competent for Restricted Purpose

Trial court was not required to instruct that testimony was admissible only for corroboration. *S. v. Crouse*, 47.

§ 97. Introduction of Additional Evidence

Trial court did not err in allowing the State to reopen its case to present additional evidence. *S. v. Buchanan*, 167.

§ 98. Presence of Defendant; Custody of Witnesses

Defendant waived his right to be present in the courtroom at rendition of the verdict by voluntarily absenting himself from the courtroom. *S. v. Billings*, 73.

Defendant was not prejudiced by the fact that several witnesses remained in the courtroom after the court ordered all witnesses removed. *S. v. Bennett*, 671.

§ 99. Conduct of the Court and its Expression of Opinion During Trial

Trial court did not depart from its judicial neutrality in carrying on a whispered conversation with a witness. *S. v. McAuliffe*, 601.

Remark by the trial judge made in the presence of prospective jurors did not prejudice defendant. *S. v. Dark*, 566.

Remarks of the trial judge made in chambers did not constitute a violation of G.S. 1-180. *Ibid.*

§ 100. Permitting Counsel to Assist Solicitor

Trial court in a homicide prosecution did not err in permitting privately employed counsel to assist the solicitor. *S. v. Page*, 435.

§ 101. Misconduct Affecting Jury

Trial court did not err in denying defendant's motion for new trial based on an outburst of the prosecuting witness and an assault on defendant by the father of the prosecuting witness. *S. v. Dais*, 379.

CRIMINAL LAW—Continued

§ 102. Argument and Conduct of Counsel or Solicitor

The solicitor's argument to the jury did not exceed reasonable bounds in a prosecution for failing to comply with a lawful command to disperse. *S. v. Clark*, 81.

Defendant was not prejudiced by questions asked him on cross-examination by the district attorney which related to collateral matters. *S. v. Covington*, 250.

Defendant was not prejudiced by a statement of a private prosecutor that a witness's brother had just shaken his finger at the prosecutor in a threatening manner. *S. v. Page*, 435.

Solicitor's jury argument in a prosecution for felonious possession of drugs was proper. *S. v. Gagne*, 615.

Solicitor's jury argument that "a person with a bad prior criminal record is just like a snake" was not prejudicial error. *S. v. Sanderson*, 669.

§ 112. Instructions on Presumptions

Trial court's error in instructing the jury as to the presumption of guilt did not prejudice defendants. *S. v. Collins*, 590.

§ 114. Expressing of Opinion by Court on Evidence in Charge

Trial court's statement in summarizing for the jury a police officer's testimony did not amount to an expression of opinion. *S. v. Frinks*, 584.

In a second degree murder prosecution, the trial judge expressed an opinion in violation of G.S. 1-180 when he instructed the jury, "I have no opinion as to whether you should find the defendant either guilty or not guilty of the three things I told you, one of which you would have to find him guilty of." *S. v. Whitley*, 666.

§ 116. Charge on Failure of Defendant to Testify

Trial court's erroneous instruction that the failure of defendants to testify "is to be regarded to their prejudice" was not prejudicial. *S. v. Willis*, 465.

Court was not required to give an instruction concerning defendant's failure to testify. *S. v. Letterlough*, 681.

§ 117. Charge on Character Evidence

Trial court erred in instructing the jury they should consider defendant's prior convictions as substantive evidence where defendant did not place his character in issue. *S. v. Cogdell*, 327.

§ 118. Charge on Contentions of the Parties

Though the court must give a clear instruction applying the law to the evidence and the positions of the parties as to the essential features of the case, there is no requirement that the contentions of both sides be stressed equally. *S. v. Crews*, 171.

§ 126. Unanimity and Acceptance of Verdict

The clerk did not suggest a verdict to the jury after the foreman stated the verdict as "Guilty of controlled substance, marijuana," omitting the word "possession." *S. v. May*, 71.

CRIMINAL LAW—Continued

§ 128. Setting Aside Verdict and Ordering Mistrial

Solicitor's improper question and request that the court rule on the question before the witness answered were not sufficiently prejudicial to require the court to grant motion for mistrial. *S. v. Harris*, 332.

Defendant was not prejudiced by a radio news broadcast where no juror heard the newscast. *S. v. Walker*, 291.

Trial court committed no error in denial of defendant's motion for mistrial based on admission of a girl's statement that she had had a baby by the defendant. *S. v. Willis*, 465.

§ 131. New Trial for Newly Discovered Evidence

Motion for a new trial on the ground of newly discovered evidence may be filed in superior court at the session at which the case was tried or at the next succeeding session following certification of affirmance of judgment. *S. v. Lee*, 4.

An appeal does not lie from a discretionary determination of a motion for a new trial for newly discovered evidence. *S. v. Lee*, 4.

§ 134. Form and Requisites of Judgment

Where the district court judgment erroneously cited the wrong statute, defendant was not prejudiced by failure of superior court to remand the case for proper judgment. *S. v. Clark*, 81.

§ 138. Severity of Sentence

Trial court at defendant's retrial erred in imposing sentences which in the aggregate are more severe than sentences imposed at the first trial. *S. v. Thomas*, 206.

There is no requirement that superior court, upon imposing a harsher sentence than that of the district court, make the reasons appear of record. *S. v. Butts*, 504; *S. v. Frinks*, 584.

§ 140. Concurrent Sentences

Though it was error to convict defendant both for robbery of a law officer and assault upon a law officer, defendant was not prejudiced since the sentences imposed upon the convictions ran concurrently. *S. v. Byrd*, 320.

§ 142. Suspended Sentence

Condition of suspended sentences by which defendants gave consent to a search of their premises for illegal liquor was valid but did not give officers the right to make an unannounced break-in through a locked door. *S. v. Mitchell*, 663.

§ 143. Revocation of Suspended Sentence

Evidence was sufficient to support court's determination that defendant breached a condition of his suspended sentence by failing to close a club he operated. *S. v. Elliott*, 334.

Trial court did not err in hearing a motion to activate suspended sentence though nonindigent defendant was not represented by counsel. *Ibid.*

§ 144. Modification and Correction of Judgment in Trial Court

Clerk of superior court had no authority to amend judgments imposed in criminal cases notwithstanding order by trial court. *S. v. Thomas*, 206.

CRIMINAL LAW—Continued

Where defendant was convicted at the 25 September 1972 session of superior court, superior court did not have authority to entertain defendant's motion made on 2 April 1973 for a new trial grounded upon the inability of the reporter to prepare a transcript. *S. v. Teat*, 484.

§ 145.1. Probation

Where condition of probation was that defendant pay a fine of \$700 "as directed by the probation officer," defendant breached such condition where he was directed by the probation officer to pay at least \$50 per month but made no payment for ten months. *S. v. Harris*, 279.

Court's authority to revoke defendant's probation was not affected by failure to bring defendant before the court when his file was previously reviewed by the court pursuant to G.S. 15-205.1. *S. v. Benfield*, 330.

§ 148. Judgments Appealable

Where prayer for judgment is continued there is no judgment and no appeal will lie. *S. v. Cook*, 353.

§ 154. Case on Appeal

Failure of the record on appeal to show jurisdiction in superior court of misdemeanors was cured by stipulation. *S. v. Billings*, 73.

Where defendant could not obtain a transcript of his trial due to the death of the reporter before she transcribed her notes, he should have compiled his record on appeal and docketed it in the Court of Appeals rather than filing a motion in superior court for a new trial. *S. v. Teat*, 484.

§ 155.5. Docketing of Record in Court of Appeals

Order of trial court extending time to serve case on appeal does not extend time to docket the appeal. *S. v. Peek*, 350.

Appeal is dismissed for failure to docket the record within the enlarged time allowed by court order. *S. v. Wilkins*, 691.

§ 162. Objections and Assignments of Error to Evidence

Where defendant failed to object at trial to the admission of statements made by him to an arresting officer, he cannot upon appeal raise the issue that the court erred in failing to hold a voir dire. *S. v. Harrington*, 473.

§ 168. Harmless Error in Instructions

Error in one portion of the charge was cured by court's final mandate to the jury. *S. v. Shumate*, 174.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Defendant was not prejudiced by an unresponsive answer of a witness where defendant did not move to strike. *S. v. Collins*, 590.

Admission of testimony by an accomplice that defendant was with him when he broke into other buildings was not prejudicial error. *S. v. Wright*, 699.

DAMAGES

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages

Trial court properly excluded a doctor's testimony that pain suffered by plaintiff could be indefinite where plaintiff offered no evidence showing the effect of new injury on an existing disc condition. *Howell v. Nichols*, 741.

§ 16. Instructions on Measure of Damages

Failure of the trial court to instruct that plaintiff could not recover for future consequences of his injury was not error. *Proctor v. Weyerhaeuser Co.*, 470.

DEATH

§ 3. Actions for Wrongful Death

Evidence in a wrongful death action was sufficient to be submitted to the jury. *Wyatt v. Haywood*, 267.

§ 4. Time Within Which Action Must be Instituted

Plaintiff's wrongful death claim is barred by the statute of limitations where plaintiff failed to qualify as administratrix in apt time. *Johnson v. Trust Co.*, 8.

DECLARATORY JUDGMENTS

§ 1. Nature and Grounds of Remedy

A declaratory judgment action was appropriate for determination of whether London options sold by a brokerage firm are securities subject to regulation by the State. *Commodities International, Inc. v. Eure, Sec. of State*, 723.

DEEDS

§ 14. Reservations

Deed is construed to convey a one-ninth undivided interest in the remainder to each of eight grantees and to reserve in the grantor the remaining one-ninth interest. *Hardy v. Edwards*, 276.

DESCENT AND DISTRIBUTION

§ 6. Wrongful Act Causing Death as Precluding Inheritance

Where insured murdered his wife who was the beneficiary of an insurance policy on his life and then committed suicide, payment of insurance proceeds to the slayer-insured's mother pursuant to the provisions of the policy did not violate the statute barring the slayer from profiting from his own wrong. *Gardner v. Insurance Co.*, 404.

DISORDERLY CONDUCT

§ 1. Nature and Elements of the Offense

G.S. 14-288.4(a) (2) is not unconstitutionally vague under the First Amendment. *S. v. Orange*, 220.

DISORDERLY CONDUCT—Continued

§ 2. Prosecutions

State's evidence was sufficient for the jury in a prosecution for failing to comply with a lawful command to disperse while occupying a school superintendent's office. *S. v. Clark*, 81.

Evidence was sufficient to be submitted to the jury in a prosecution for refusal to obey an order to disperse from in front of courthouse. *S. v. Orange*, 220.

DIVORCE AND ALIMONY

§ 2. Process and Pleadings

Defendant in an absolute divorce action was entitled to a jury trial where she requested it before the case was called for trial. *Laws v. Laws*, 344.

§ 8. Abandonment

Evidence tending to show that plaintiff and defendant agreed on a separation was insufficient to require submission of the issue of abandonment to the jury. *Lemons v. Lemons*, 303.

§ 13. Separation for Statutory Period

District court order providing for custody and support legalized the separation of the parties, and the defense of abandonment was no longer available to defendant husband in the wife's action for absolute divorce on the ground of a year's separation. *Harrington v. Harrington*, 419.

Adultery is not a defense to an action for absolute divorce on the ground of a year's separation. *Ibid.*

§ 18. Alimony and Subsistence Pendente Lite

Trial court erred in awarding alimony pendente lite to the wife where the court made no finding as to whether the wife had any separate estate or financial resources. *Simmons v. Simmons*, 68.

Evidence was insufficient to show that plaintiff wife was the dependent spouse. *Lemons v. Lemons*, 303.

Order permitting plaintiff to use 66 acres surrounding the residence pending trial was not improper. *Furr v. Furr*, 487.

Court's findings supported amount awarded as counsel fees and alimony pendente lite. *Ibid.*

Notice was required to be served on defendant before the court could enter an order transferring ownership of a motor vehicle to plaintiff. *Howell v. Howell*, 634.

Trial court made insufficient findings to support order awarding alimony pendente lite. *Newsome v. Newsome*, 651.

§ 23. Child Support

Trial court erred in reducing amount of child support where no material change of circumstances was shown. *Clemons v. Morris*, 76.

§ 24. Child Custody

Order giving defendant child visitation rights is not invalid by reason of its failure to define the specific times for visitation. *Furr v. Furr*, 487.

ELECTRICITY

§ 2. Control and Regulation of Service to Customers

Power of a municipality to grant franchises to public utilities to provide utility service to its citizens must yield to the priority of the State to regulate through the Utilities Commission public utilities even when they are operated within the boundaries of the municipality. *Power Co. v. City of High Point*, 91.

EQUITY

§ 2. Laches

Plaintiffs were barred by the doctrine of laches from attacking the validity of a rezoning ordinance more than two years after the ordinance was passed. *Taylor v. City of Raleigh*, 259.

ESCAPE

§ 1. Elements of the Offense

Escape statute declares a second escape a felony even though defendant was serving different sentences when the two escapes occurred. *S. v. Stone*, 352.

ESTATES

§ 9. Joint Estates in Personalty

Evidence that wife advanced funds to husband which he used to purchase personalty was insufficient to show that the personalty was owned by husband and wife as tenants in common. *Long v. Eddleman*, 43.

ESTOPPEL

§ 1. Creation and Operation of Estoppel by Deed

A person who joined in the execution of a general warranty deed was estopped to assert a claim of right of way by easement over the land conveyed. *Sparks v. Choate*, 62.

EVIDENCE

§ 28.5. Affidavits

Affidavit not sworn to before a notary and based on hearsay should not be considered on motion for summary judgment. *Peace v. Broadcasting Corp.*, 631.

§ 29. Accounts, Ledgers and Private Writings

Trial court erred in giving consideration to a document which purported to be a subrogation receipt where the document was not properly authenticated. *Insurance Co. v. Tire Co.*, 237.

Records of a corporation were insufficient to show the loss sustained by the corporation in a fire. *Ibid.*

Trial court properly allowed a doctor to read clinical notes into evidence although the person who had prepared the notes was not available as a witness. *S. v. Propst*, 548.

EVIDENCE—Continued

§ 31. Best Evidence Relating to Writings

Best evidence rule does not require that when a document which is an amendment of an earlier document is admitted into evidence the earlier document must be admitted at the same time. *Craver v. Insurance Co.*, 660.

§ 36. Declarations by Agent

Trial court did not err in excluding testimony by one plaintiff as to a statement defendant's employee made to her. *Leary v. Transit Co.*, 702.

EXECUTION

§ 1. Property Subject to Execution

Trial court correctly determined that the trustees of the judgment debtor-church hold title to the church property in a passive trust and that the property is subject to sale under execution. *Fishel and Taylor v. Church*, 647.

EXECUTORS AND ADMINISTRATORS

§ 2. Appointment of Administrators

Plaintiff's wrongful death claim is barred by the statute of limitations where plaintiff failed to qualify as administratrix in apt time. *Johnson v. Trust Co.*, 8.

FALSE IMPRISONMENT

§ 2. Actions for

Plaintiff's evidence was insufficient for the jury in an action against a department store for false imprisonment based on action of the assistant manager who requested plaintiff to return to the store so he could examine a sweater she was wearing. *Shaw v. Stores, Inc.*, 140.

FIDUCIARIES

Fraud or unfair dealing will not be inferred in the sale of a corporation's stock by the president-manager to the directors absent a showing of special circumstances creating a fiduciary relationship. *Ragsdale v. Kennedy*, 509.

FIRES

§ 3. Presumptions and Evidence

In an action to recover for damages from a fire which originated in defendant's apartment and spread to plaintiffs' apartment, trial court erred in submitting the case to the jury under the doctrine of *res ipsa loquitur*, but the case should have been submitted on the question of actionable negligence. *Gaston v. Smith*, 242.

FRAUD

§ 7. Constructive Fraud

Fraud or unfair dealing will not be inferred in the sale of a corporation's stock by the president-manager to the directors absent a showing of special circumstances creating a fiduciary relationship. *Ragsdale v. Kennedy*, 509.

§ 9. Pleadings

Allegations by corporate directors that the president and manager of a corporation told them the corporation was a "gold mine" were insufficient to allege active fraud by the president and manager in the sale of stock to the directors. *Ragsdale v. Kennedy*, 509.

GAMBLING

§ 4. Games of Chance

Trial court's instruction on quantum of proof required for conviction in a gambling case was erroneous. *S. v. Kassouf*, 186.

HIGHWAYS AND CARTWAYS

§ 10. Obstruction of Public Roads

Evidence was sufficient to be submitted to the jury in a prosecution for obstructing a public highway. *S. v. Frinks*, 584.

In a prosecution for obstructing a highway, the trial court properly allowed eyewitnesses to describe the scene. *Ibid.*

Defendants were not prejudiced by trial court's use of the word "feloniously" in its jury instructions. *Ibid.*

HOMICIDE

§ 4. Murder in the First Degree

Where defendant was charged with three felonies and felony murder and convicted of all except the felony murder, there was no merger of the felonies into the felony murder. *S. v. Glenn*, 6.

§ 8. Effect of Intoxication Upon Mental Capacity

Trial court properly charged the jury that defendant's intoxication had no bearing upon his guilt or innocence of the lesser included offenses in the charge of first degree murder. *S. v. Cummings*, 452.

§ 15. Relevancy and Competency of Evidence

Evidence of loud mufflers on the victim's assailant's car was properly admitted in a homicide and armed robbery case. *S. v. Curtis*, 606.

§ 21. Sufficiency of Evidence

State's evidence was sufficient for the jury in a second degree murder case. *S. v. Walker*, 22.

State's evidence was sufficient to show that deceased died from a blood clot resulting from a gunshot wound inflicted by defendant. *S. v. Brake*, 342.

HOMICIDE—Continued

State's evidence was sufficient for the jury on the issue of defendant's guilt of accessory after the fact of involuntary manslaughter. *S. v. Hicks*, 554.

State's evidence was sufficient to sustain a verdict of voluntary manslaughter. *S. v. Carver*, 674.

Evidence was sufficient to be submitted to the jury in a homicide case where it tended to show death by stabbing. *S. v. Curtis*, 606.

§ 24. Instructions on Burden of Proof

Defendant was not prejudiced by trial court's erroneous instruction that defendant must prove he acted in self-defense in order to reduce the crime to manslaughter. *S. v. Carver*, 674.

§ 27. Instructions on Manslaughter

Where evidence showed intentional firing of a pistol, trial court did not err in failing to instruct on involuntary manslaughter. *S. v. Walker*, 22.

§ 28. Instructions on Defenses

Trial court adequately instructed the jury on defendant's contention that he had drawn his pistol in self-defense and it accidentally discharged. *S. v. Canty*, 45.

§ 30. Submission of Guilt of Lesser Degree of the Crime

In a second degree murder case the trial court did not err in failing to submit lesser included offenses to the jury. *S. v. Harrington*, 473.

HOSPITALS

§ 1. Definitions; Public and Private Hospitals

In passing a local act providing for the establishment of a hospital, the Legislature intended the hospital to be a county agency and not a separate municipality. *Sides v. Hospital*, 117.

HUSBAND AND WIFE

§ 12. Revocation and Rescission of Separation Agreement

Plaintiff was estopped to challenge the validity of a property settlement decree on the ground it was entered without defendant's consent. *Broughton v. Broughton*, 233.

INDICTMENT AND WARRANT

§ 6. Issuance of Warrant

Affidavit for an arrest warrant shows it was made on the personal knowledge of the sheriff-affiant. *S. v. Clark*, 81.

An affidavit was sufficient to support a warrant for defendant's arrest for refusal to obey an order to disperse. *S. v. Orange*, 220.

§ 10. Identification of Accused in Indictment

Indictment which incorrectly designated defendant's middle name was not subject to quashal. *S. v. Faire*, 573.

INDICTMENT AND WARRANT—Continued

§ 13. Bill of Particulars

Trial court did not abuse its discretion in denial of motion for a bill of particulars. *S. v. Vester*, 16.

Defendant waived objection to the solicitor's failure to furnish a bill of particulars ordered by the court by failing to make such objection before the jury was impaneled. *S. v. Moore*, 640.

INFANTS

§ 8. Jurisdiction to Award Custody of Minor

Trial court in a custody proceeding properly excluded a Georgia court order entered when the Georgia court did not have jurisdiction. *Swanson v. Swanson*, 152.

§ 9. Hearing and Grounds for Awarding Custody of Minor

Trial court in a child custody proceeding properly excluded complaints in a domestic action between plaintiffs. *Swanson v. Swanson*, 152.

Former foster parent of children placed in custody of the county department of social services had no standing to have the court determine custody of the children after the department removed them from the foster parent's home to another facility. *Browne v. Dept. of Social Services*, 476.

Trial court properly awarded custody of minor children to the father rather than the mother. *Beck v. Beck*, 655.

§ 10. Commitment of Minors for Delinquency

Appeal from adjudication of delinquency is premature where the court continued disposition until a specific date to give the court counselor an opportunity to conduct a home study. *In re Meyers*, 11.

Petition alleging delinquency based upon larceny of an automobile by a minor should have been dismissed where the State failed to prove larceny. *In re Owens*, 313.

G.S. 7A-280 providing for the trial of a minor who has reached his 14th birthday is constitutional. *In re Bullard*, 245.

The district court judge who determines probable cause when a 14-year-old is charged with a felony is not required to support his determination of probable cause by detailed findings of fact. *Ibid.*

Where the district court held a preliminary hearing to determine there was probable cause and transferred the case to superior court, defendant was not subjected to double jeopardy by being tried in superior court. *Ibid.*

INJUNCTIONS

§ 4. To Restrain Violation of Statute or Ordinance

Trial court did not err in failing permanently to enjoin a school board from violating the N. C. Open Meetings Law. *Eggimann v. Bd. of Education*, 459.

§ 5. Injunction to Restrain Enforcement of Statute

Ordinarily an injunction will not lie to restrain the enforcement of a statute. *Commodities International, Inc. v. Eure, Sec. of State*, 723.

INSURANCE

§ 2. Brokers and Agents

Provision of employment contract between plaintiff and defendant hiring plaintiff as state manager should be construed to mean that when plaintiff's loss ratio rose above 50%, his commissions should be reduced by 5% of his commissions, not 5% of the premiums. *Houser v. Insurance Co.*, 398.

§ 6. Construction and Operation of Policies

Insurance contracts are construed in favor of the insured and against the insurer. *Duke v. Insurance Co.*, 392.

§ 30. Effect of Death of Beneficiary of Life Policy

Where insured murdered his wife who was the beneficiary of an insurance policy on his life and then committed suicide, payment of insurance proceeds to the slayer-insured's mother pursuant to the provisions of the policy did not violate the statute barring the slayer from profiting from his own wrong. *Gardner v. Insurance Co.*, 404.

§ 42. Notice and Proof of Disability

Clause in plaintiff's disability insurance policy did not require that he be under the regular care of a physician when such care would not improve his condition. *Duke v. Insurance Co.*, 392.

§ 112. Subrogation of Liability Insurer

Automobile liability insurer was subrogated to the rights of the insured against the tortfeasor for an amount paid to insured under the medical payments provision of the policy. *Carver v. Mills*, 745.

§ 112.5. Filing False Claim

Filing an insurance claim based on a staged accident is a violation of G.S. 14-214 even if one who stages the accident is actually injured. *S. v. Walker*, 291.

Evidence in a prosecution for presenting a false insurance claim was sufficient to indicate a contract of insurance between defendant and the insurer. *Ibid.*

§ 135. Subrogation of Fire Insurer; Rights Against Tortfeasor

Where a corporation which held a security interest in chattels purchased insurance and plaintiff insurer paid the corporation's loss sustained in a fire, plaintiff insurer was subrogated to the rights of the corporation against defendant who held the chattels. *Insurance Co. v. Tire Co.*, 237.

Records of a corporation were insufficient to show the loss sustained by the corporation in a fire. *Ibid.*

JUDGMENTS

§ 24. Setting Aside Judgment for Mistake, Surprise or Excusable Neglect

Trial court properly refused to set aside entry of default against defendant bottling company where the company transmitted suit papers to its liability insurer and paid no further attention to the lawsuit. *Howell v. Haliburton*, 40.

Order setting aside judgment of absolute divorce on the ground of mistake, surprise or excusable neglect was not supported by the evidence or findings. *Mason v. Mason*, 494.

JURY

§ 1. Right to Trial by Jury

Defendant in an absolute divorce action was entitled to a jury trial where she requested it before the case was called for trial. *Laws v. Laws*, 344.

§ 2. Special Venire

Trial court properly denied defendant's motion for a special venire based on newspaper articles. *S. v. Logan*, 55.

§ 6. Examination of Prospective Jurors

Trial court did not err in permitting the solicitor to ask prospective jurors whether they had attended meetings at a certain church while defendant was at the church. *S. v. Clark*, 81.

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Lien of Subcontractor or Material Furnisher

In an action against an owner and contractor to recover for labor and materials furnished in the construction of a house, trial court properly dismissed the action against the owner. *Maxwell v. Perry*, 58.

§ 6. Filing of Notice or Claim of Lien

Lien filed more than 120 days after the last furnishing of labor and materials was invalid. *Strickland v. Contractors, Inc.*, 729.

LANDLORD AND TENANT

§ 18. Forfeiture for Nonpayment of Rent

Acceptance by plaintiff landlord of late payment of rent constituted a waiver of the forfeiture of the lease. *Mewborn v. Haddock*, 285.

LARCENY

§ 6. Competency and Relevancy of Evidence

Items connected with the break-in and larceny of a drugstore with which defendant was charged were admissible in evidence. *S. v. Averette*, 181.

§ 7. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for larceny of a tractor. *S. v. Boykins*, 34.

State's evidence was sufficient for the jury in a prosecution for larceny after breaking and entering though articles were not removed from the premises which had been broken and entered. *S. v. Vickers*, 282.

§ 8. Instructions

Instructions as to the value of property taken were unnecessary in a prosecution for larceny pursuant to breaking and entering. *S. v. Wright*, 428.

LIBEL AND SLANDER

§ 16. Sufficiency of Evidence and Nonsuit

Plaintiff's evidence was insufficient for the jury in an action against a department store for slander based on the action of the assistant manager who requested plaintiff to return to the store so he could examine a sweater she was wearing. *Shaw v. Stores, Inc.*, 140.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time From Which Statute Begins to Run

Issue of fact existed as to running of statute of limitations in an action to recover possession of furniture located in the home of plaintiff's deceased mother. *Hodges v. Johnson*, 308.

Action against a clerk of court based on alleged negligence in the issuance of a summons is governed by the three-year statute of limitations. *Brantley v. Meekins*, 683.

LIS PENDENS

Plaintiff was not entitled to the filing of a notice of lis pendens in his action for personal judgment for the payment of money. *Lord v. Jeffreys*, 13.

MALICIOUS PROSECUTION

§ 4. Want of Probable Cause

Plaintiff's evidence that she was convicted of trespass in district court conclusively established the existence of probable cause for that charge although nol pros was entered in superior court. *Falkner v. Almon*, 643.

§ 13. Sufficiency of Evidence

Plaintiff's evidence made a prima facie showing for the jury in an action for malicious prosecution based on warrants for trespass and larceny of a Christmas tree. *Falkner v. Almon*, 643.

MASTER AND SERVANT

§ 11. Agreements Not to Engage in Like Employment After Termination of Employment

Covenants not to compete entered into by each of the defendants when they were employed by plaintiff were founded upon adequate consideration. *Sales & Service v. Williams*, 410.

Covenants not to compete which included a territorial limitation of a 150 mile radius and a time limitation of two years were not too broad. *Ibid.*

§ 108. Right to Unemployment Compensation

Longshoremen were not available for work within the meaning of the Unemployment Compensation Act by reason of a collective bargaining agreement establishing a guaranteed annual income fund and requiring them to be at the union hiring hall each day. *In re Beatty*, 563.

MORTGAGES AND DEEDS OF TRUST

§ 40. Suits to Set Aside Foreclosure

Corporation's purchase of property at a foreclosure sale could not be set aside on the ground the corporation's charter had been suspended where the corporation conveyed the property to an innocent purchaser. *Parker v. Homes, Inc.*, 297.

MUNICIPAL CORPORATIONS

§ 1. Definition and Creation of Municipal Corporations

In passing a local act providing for the establishment of a hospital, the Legislature intended the hospital to be a county agency and not a separate municipality. *Sides v. Hospital*, 117.

§ 2. Territorial Extent and Annexation

Plaintiffs who do not own property in a noncontiguous area annexed by a city have no standing to challenge the validity of the annexation ordinance. *Taylor v. City of Raleigh*, 259.

There is no requirement that a second public hearing is always necessary when an annexation report is amended. *Williams v. Town of Grifton*, 611.

Finding of fact by the trial court that a proposed water system would provide adequate fire protection for an annexed area was supported by competent evidence and is conclusive on appeal. *Ibid.*

§ 4. Powers of Municipalities

Power of municipality to grant franchises to public utilities to provide utility service to its citizens must yield to the priority of the State to regulate through the Utilities Commission public utilities even when they are operated within the boundaries of the municipality. *Power Co. v. City of High Point*, 91.

§ 29. Nature and Extent of Municipal Police Power

Summary judgment was properly entered in favor of a city in an action to recover damages for wrongful taking of plaintiffs' property based on an order that plaintiffs repair or demolish certain dwellings declared unfit for habitation and on the city's demolition of certain other dwellings. *Harrell v. City of Winston-Salem*, 386.

§ 30. Zoning Ordinances and Building Permits

Building inspector had no discretion to withhold building permit. *Quadrant Corp. v. City of Kinston*, 31.

Board of adjustment's decision that plaintiffs are entitled to a building permit is final where no aggrieved party sought review of the decision in superior court. *Ibid.*

Application for a special use permit is remanded to the board of adjustment where the board's denial of the permit was not supported by findings of fact. *Long v. Board of Adjustment*, 191.

Plaintiffs were barred by the doctrine of laches from attacking the validity of a rezoning ordinance more than two years after the ordinance was passed. *Taylor v. City of Raleigh*, 259.

NARCOTICS

§ 1. Elements and Essentials of Statutory Offenses

Defendant's motion to quash the bill of indictment against him was properly denied where the ground for his motion was the alleged unconstitutionality of the presumption of possession of marijuana for sale. *S. v. McAuliffe*, 601.

§ 3. Competency and Relevancy of Evidence

A bottle of amphetamines seized from defendant's apartment without a warrant was admissible. *S. v. Crews*, 171.

Witnesses were properly allowed to testify that they observed other bags with white powder in the pouch from which bags they purchased were taken. *S. v. Brinkley*, 339.

Trial court properly admitted hypodermic needle and syringe found during a search of defendant's apartment but alleged by defendant to be owned by another. *S. v. Covington*, 250.

Trial court properly allowed police officer to testify as an expert witness concerning use of narcotics paraphernalia and the cutting of heroin in the Durham area. *Ibid.*

§ 4. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for distribution of marijuana. *S. v. Armstrong*, 36; *S. v. Williams*, 502.

Evidence of defendants' constructive possession of drugs found in defendants' mobile home was sufficient to be submitted to the jury. *S. v. Gagne*, 615.

§ 4.5. Instructions

Trial court's instruction on entrapment was proper in a prosecution for distribution of marijuana. *S. v. Armstrong*, 36.

Trial court in a prosecution for possession of heroin with intent to deliver did not err in instructing the jury that they could find defendant guilty of possession with intent to distribute, guilty of simple possession, or not guilty. *S. v. Aikens*, 310.

§ 5. Verdict and Punishment

Defendant was not placed in double jeopardy by his conviction for both possession and sale of the same heroin. *S. v. Brinkley*, 339.

Trial court did not err in failing to set aside verdict where defendant was charged with possession of marijuana with intent to distribute but the jury verdict was "guilty of possession for the purpose of sale." *S. v. Williams*, 502.

Recitals in the judgments for possession of phencyclidine hydrochloride that defendants were found guilty of a felony are erroneous since defendants were charged with a first offense which was a misdemeanor. *S. v. Gagne*, 615.

NEGLIGENCE

§ 5.1. Business Places; Duties to Invitees

Trial court erred in granting defendant's motion for summary judgment in an action to recover for injuries sustained when plaintiff fell while shopping in defendant's grocery store. *Tolbert v. Tea Co.*, 491.

NEGLIGENCE—Continued

§ 31. *Res Ipsa Loquitur*

In an action to recover for damages from a fire which originated in defendant's apartment and spread to plaintiffs' apartment, trial court erred in submitting the case to the jury under the doctrine of *res ipsa loquitur*, but the case should have been submitted on the question of actionable negligence. *Gaston v. Smith*, 242.

§ 34. Sufficiency of Evidence of Contributory Negligence

Evidence was insufficient to show that plaintiff was contributorily negligent as a matter of law when he was injured while unloading logs from a truck. *Proctor v. Weyerhaeuser Co.*, 470.

§ 57. Sufficiency of Evidence and Nonsuit in Action by Invitee

In an action to recover for personal injuries sustained by plaintiff when she fell on defendants' polished floor, evidence was insufficient to show negligence on the part of defendants in maintaining their premises. *Burkhead v. White*, 432.

NOTICE

§ 1. Necessity of Notice

Notice was required to be served on defendant before the court could enter an order transferring ownership of a motor vehicle to plaintiff. *Howell v. Howell*, 634.

§ 2. Sufficiency and Requisites

Defendant was not given adequate notice of hearing on motions that past due alimony pendente lite be reduced to judgment and that counsel fees be allowed. *Howell v. Howell*, 634.

§ 3. Waiver of Notice

Defendant did not waive lack of notice of hearing on motion that past due alimony be reduced to judgment by entering objection to the hearing. *Howell v. Howell*, 634.

OBSCENITY

Defendants were entitled to application of the favorable change in the statute under which they were convicted made prior to determination of their appeal which required a civil determination of the obscene nature of materials prior to the arrest of an individual for their dissemination. *S. v. Hart*, 738.

PARENT AND CHILD

§ 1. Relationship Generally

A person not a party to a proceeding to terminate parental rights has no right to seek review of the case by a motion in the cause. *Browne v. Dept. of Social Services*, 476.

In a hearing on a motion to terminate parental rights, trial court is not required to consider all the evidence which petitioner might desire to present. *Dept. of Social Services v. Roberts*, 658.

Evidence supported order terminating parental rights of the mother on the ground of physical abuse of the child. *In re Hennie*, 690.

PARTNERSHIP**§ 5. Liabilities of Partners for Torts Committed by One Partner**

A professional association of attorneys engaged in the practice of labor law is not liable for one attorney's misappropriation of funds given to such attorney for the purpose of investment in common stock. *Zimmerman v. Hogg & Allen*, 544.

PHYSICIANS AND SURGEONS**§ 16. Sufficiency of Evidence and Applicability of Doctrine of Res Ipsa Loquitur**

Res ipsa loquitur was inapplicable in plaintiff's action to recover for defendants' alleged negligence in treating her arm fracture with traction. *Ballance v. Wentz*, 363.

§ 17. Departing from Approved Methods or Standards of Care

Trial court properly directed verdict for defendant in a malpractice action where plaintiff failed to offer evidence as to what constituted good orthopedic practice and thereby failed to establish the standard of care required of defendants. *Ballance v. Wentz*, 363.

PLEADINGS**§ 4. Joining Contract Actions**

Plaintiff properly joined claims against defendant for breach of a contract to make improvements to a house located in this State and breach of a contract to construct a house in Florida. *Gibbs v. Heavlin*, 482.

PROCESS**§ 16. Service on Nonresidents in Actions to Recover for Negligent Operation of Automobile in this State**

In an action growing out of a motor vehicle accident in this State, service of process may be made on a nonresident driver either by service on the Commissioner of Motor Vehicles or by service by registered mail. *House v. House*, 686.

QUASI-CONTRACTS**§ 2. Actions to Recover on Implied Contracts**

Trial court erred in instructing the jury it should consider whether plaintiff should be compensated for doors which defendant prevented plaintiff from installing. *Forbes v. Pillmon*, 69.

Trial court properly entered summary judgment on the issue of liability in a quasi-contract action brought by a motor carrier to recover for shipping charges, but the court erred in entering summary judgment on the damages issue. *Freight Carriers v. Allen Co.*, 442.

RAILROADS**§ 5. Crossing Accident**

Plaintiff's evidence disclosed her intestate was contributorily negligent in being struck by a train at a crossing. *Neal v. Booth*, 415.

RAILROADS—Continued

§ 6. Warning or Protective Devices

Plaintiff's evidence was sufficient to establish negligence on the part of defendant railway and engineer in failing to give warning. *Neal v. Booth*, 415.

RAPE

§ 1. Nature and Elements of the Offense

Defendant was not placed in double jeopardy when the State took a nolle prosequi with leave in a rape case and defendant was tried for sodomy growing out of the same occurrence. *S. v. Crouse*, 47.

§ 18. Prosecution for Assault With Intent to Commit

Trial court's instruction on assault with intent to commit rape was not improper by reason of the omission of the words "at all events against her will and notwithstanding any resistance she may make." *S. v. Dais*, 379.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was insufficient for the jury on the issue of defendant's guilt of receiving stolen goods where there was no evidence that someone other than defendant stole the property or that defendant received the property from another. *S. v. Burnette*, 29.

REFORMATION OF INSTRUMENTS

§ 4. Pleadings

Allegation that provision for attorney fees in a promissory note was not stricken because of mutual mistake was not sufficiently particular to support revision of the note. *Ragsdale v. Kennedy*, 509.

§ 7. Directed Verdict

Directed verdict was properly entered in favor of defendants in an action to have a deed reformed and declared a deed of trust. *Brown v. Gurkin*, 456.

REGISTRATION

§ 1. Necessity for Registration

Holder of a promissory note had no duty to record the security agreement to protect the collateral for endorsers. *Trust Co. v. Larson*, 371.

ROBBERY

§ 3. Competency of Evidence

Evidence of loud mufflers on the victim's assailant's car was properly admitted in a homicide and armed robbery case. *S. v. Curtis*, 606.

§ 4. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for robbery of a service station attendant. *S. v. Russell*, 156.

ROBBERY—Continued

Evidence was sufficient to show that defendant aided and abetted another in an armed robbery of a storeowner, *S. v. Wright*, 428; of a service station attendant, *S. v. Moore*, 679.

Robbery victim's identification of one defendant was sufficient for the jury notwithstanding the uncertainty of the victim's pretrial identification of defendant. *S. v. Willis*, 465.

Evidence was sufficient to be submitted to the jury in an armed robbery case. *S. v. Curtis*, 606.

§ 5. Instructions

Trial court in a common law robbery case did not err in instructing the jury that defendant was not being tried for armed robbery and carrying a concealed weapon. *S. v. Johnson*, 183.

RULES OF CIVIL PROCEDURE**§ 4. Service of Process**

In an action growing out of a motor vehicle accident in this State, service of process may be made on a nonresident driver either by service on the Commissioner of Motor Vehicles or by service by registered mail. *House v. House*, 686.

§ 6. Time

Defendant was not given adequate notice of hearing on motions that past due alimony pendente lite be reduced to judgment and that counsel fees be allowed. *Howell v. Howell*, 634.

§ 8. General Rules of Pleadings

Failure of plaintiff to plead last clear chance would not preclude submission of that issue to the jury. *Thacker v. Harris*, 103.

§ 9. Pleading Special Matters

Allegation that provision for attorney fees in a promissory note was not stricken because of mutual mistake was not sufficiently particular to support revision of the note. *Ragsdale v. Kennedy*, 509.

§ 18. Joinder of Claims

Plaintiff properly joined claims against defendant for breach of a contract to make improvements to a house located in this State and breach of a contract to construct a house in Florida. *Gibbs v. Heavlin*, 482.

§ 26. Depositions in a Pending Action

Trial court properly excluded depositions of plaintiff and his father offered for the purpose of corroborating their testimony at the trial. *Miller v. Kennedy*, 163.

§ 55. Default Judgment

Trial court properly refused to set aside entry of default against defendant bottling company where the company transmitted suit papers to its liability insurer and paid no further attention to the lawsuit. *Howell v. Haliburton*, 40.

RULES OF CIVIL PROCEDURE—Continued

§ 56. Summary Judgment

Court erred in basing summary judgment on the testimony at a prior trial where plaintiff had been granted a new trial by the appellate court. *Hodges v. Johnson*, 308.

Affidavit not sworn to before a notary and based on hearsay should not be considered on motion for summary judgment. *Peace v. Broadcasting Corp.*, 631.

§ 58. Entry of Judgment

Signing of a judgment by the trial judge was sufficient to require the clerk to file such judgment without a separate order instructing him to do so. *Barringer & Gaither v. Whittenton*, 316.

Defendant was given sufficient notice of entry of judgment where plaintiff's counsel certified that a true copy had been mailed to him. *Ibid.*

§ 60. Relief from Judgment or Order

A person not a party to a proceeding to terminate parental rights has no right to seek review of the case by a motion in the cause. *Browne v. Dept. of Social Services*, 476.

Order setting aside judgment of absolute divorce on the ground of mistake, surprise or excusable neglect was not supported by the evidence or findings. *Mason v. Mason*, 494.

SALES

§ 14. Actions for Breach of Warranty

In breach of warranty action to recover for deficiencies in a house, plaintiffs were not prejudiced by exclusion of letters written by them and offered for corroboration, by the court's refusal to allow plaintiffs to testify as to defects from typewritten notes, or by the court's erroneous admission of hearsay testimony concerning an appraisal of the house. *Griffin v. Wheeler-Leonard & Co.*, 323.

§ 17. Sufficiency of Evidence in Action for Breach of Warranty

Plaintiffs' evidence was insufficient to establish a right to recover either under express or implied warranty in an action for deficiencies in a house purchased by plaintiffs. *Griffin v. Wheeler-Leonard & Co.*, 323.

SCHOOLS

§ 9. Selection of School Site

School board's selection of a school site was not void by reason of private meetings held by the board at which site selection was discussed. *Eggimann v. Board of Education*, 459.

SEALS

The seal on a promissory note imports a valuable consideration. *Ragsdale v. Kennedy*, 509.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

A bottle of amphetamines seized from defendant's apartment without a warrant was admissible. *S. v. Crews*, 171.

Officer had probable cause to search defendant's vehicle for marijuana without a warrant based on information received from a confidential informant, notwithstanding the informant gave the officer no facts or circumstances justifying his claim that the vehicle contained marijuana. *S. v. Ketchie*, 637.

Failure of the court to make findings of fact at the conclusion of a voir dire to determine the propriety of a warrantless search and seizure was not prejudicial error. *S. v. Mitchell*, 663.

§ 2. Consent to Search Without Warrant

Condition of suspended sentences by which defendants gave consent to a search of their premises for illegal liquor was valid but did not give officers the right to make an unannounced break-in through a locked door. *S. v. Mitchell*, 663.

§ 3. Requisites and Validity of Search Warrant

Probable cause existed for the issuance of a search warrant where an officer found a bottle of amphetamines in plain view. *S. v. Crews*, 171.

Affidavit based on information furnished a police officer by a confidential informant was sufficient to support the issuance of a warrant to search defendant's apartment for heroin. *S. v. Covington*, 250.

Affidavit was sufficient to support issuance of a search warrant for marijuana. *S. v. Reavis*, 499.

Even if the trial court erred in allowing into evidence a search warrant and its accompanying affidavit, such error was not prejudicial. *Ibid.*

Affidavit stating that "A confidential and reliable informant who has given reliable information says that there is nontaxpaid whiskey at above location at this time" was sufficient to establish probable cause for issuance of a warrant. *S. v. Edwards*, 535.

Trial court properly allowed the State to prove the contents of a lost warrant by photostatic copy of the original made by a deputy clerk of superior court. *Ibid.*

§ 4. Search Under the Warrant

Requirements of G.S. 15-44 were met where a deputy sheriff knocked on defendants' door and informed them that he was a law officer and that he had a search warrant to search the trailer. *S. v. Gagne*, 615.

SPECIFIC PERFORMANCE

Contract for sale of land was not procured by overreaching on the part of the buyer. *Hutchins v. Honeycutt*, 527.

STATUTES

§ 10. Construction of Criminal Statutes

Defendants were entitled to application of the favorable change in the statute under which they were convicted made prior to determination of their appeal which required a civil determination of the obscene nature of materials prior to the arrest of an individual for their dissemination. *S. v. Hart*, 738.

TAXATION

§ 9. Taxes Constituting Burden on Interstate Commerce

Provisions of soft drink tax statute requiring nonresident distributors to attach a taxpaid crown to each container and to pay larger taxes than resident distributors constitutes an undue burden on interstate commerce in violation of U. S. Constitution. *Food Stores v. Jones, Comr. of Revenue*, 272.

§ 25. Ad Valorem Taxes

Goods of nonresident corporation shipped into this State and stored in a public warehouse until customers placed an order for the goods were not goods held "for the purpose of transshipment" and were subject to ad valorem taxation in the county in which they were stored. *In re Martin*, 225.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

Statutes and Utilities Commission rules adopted pursuant thereto requiring a public utility to obtain Commission approval before issuing any securities impose an undue burden on interstate commerce when applied to Southern Bell Telephone and Telegraph Company. *Utilities Comm. v. Telegraph Co.*, 714.

TENANTS IN COMMON

§ 1. Nature and Incidents of the Estate

Evidence that wife advanced funds to husband which he used to purchase personalty was insufficient to show that the personalty was owned by husband and wife as tenants in common. *Long v. Eddleman*, 43.

TORTS

§ 7. Release from Liability

Release of insurer by plaintiff served to bar any subsequent action by plaintiff against insured. *Carder v. Henson*, 318.

TRIAL

§ 33. Statement of Evidence

Trial court's instruction that a blackboard diagram was not substantive evidence was proper. *Wyatt v. Haywood*, 267.

§ 36. Expression of Opinion on Evidence in Instructions

Trial court did not express an opinion in its instructions in a wrongful death action. *Wyatt v. Haywood*, 267.

§ 43. Correction of Verdict by Jury

Where the jury in a wrongful death action answered the issue of compensatory damages, "Expenses for funeral, burial plot and ambulance, as cited in Court," trial court properly permitted the jury to correct its verdict by substituting the sum of such expenses as its verdict. *Brown v. Moore*, 445.

TRIAL—Continued

§ 52. Setting Aside Verdict for Inadequate Award

Trial court in a wrongful death action properly refused to set aside for inadequacy a verdict which compensated plaintiff only for funeral, burial plot and ambulance expenses. *Brown v. Moore*, 445.

TRUSTS

§ 3. Passive Trusts

Trial court correctly determined that the trustees of the judgment debtor-church hold title to the church property in a passive trust and that the property is subject to sale under execution. *Fishel and Taylor v. Church*, 647.

UNIFORM COMMERCIAL CODE

§ 14. Price and Delivery Under Contract

In an action to collect for materials furnished and services rendered by plaintiff in making improvements to defendants' property, trial court did not err in failing to instruct the jury that, "If the plaintiff did not have a reasonable belief that the goods would be accepted, he does not have the right to cure his defect." *Meads v. Davis*, 479.

§ 33. Discharge, Payment and Satisfaction

Failure of the holder of a promissory note to record the security agreement did not constitute an unjustifiable impairment of the collateral, and accommodation endorsers remained bound to the holder pursuant to their endorsements after the collateral was sold by the trustee in bankruptcy of the debtor. *Trust Co. v. Larson*, 371.

UTILITIES COMMISSION

§ 2. Jurisdiction and Authority of Commission

Statutes and Utilities Commission rules adopted pursuant thereto requiring a public utility to obtain Commission approval before issuing any securities impose an undue burden on interstate commerce when applied to Southern Bell Telephone and Telegraph Company. *Utilities Comm. v. Telegraph Co.*, 714.

§ 4. Jurisdiction and Authority Over Electric Companies

A power company may not abandon service to any customer without consent of the customer or authority of the Utilities Commission. *Power Co. v. City of High Point*, 91.

Power of a municipality to grant franchises to public utilities to provide utility service to its citizens must yield to the priority of the State to regulate through the Utilities Commission public utilities even when they are operated within the boundaries of the municipality. *Ibid.*

§ 9. Appeal and Review

Appeal was improper from an order of the Utilities Commission allowing a power company an interim rate increase. *Morgan, Atty. General v. Power Co.*, 300.

Appeal from an interim order of the Utilities Commission permitting an electric power company to add a coal cost adjustment charge to its

UTILITIES COMMISSION—Continued

rates is dismissed as premature. *Morgan, Atty. General v. Power Co.*, 497.

VENDOR AND PURCHASER**§ 5. Specific Performance**

Contract for sale of land was not procured by overreaching on the part of the buyer. *Hutchins v. Honeycutt*, 527.

Plaintiff was not entitled to specific performance of an alleged contract for the sale of real property where any agreement between plaintiff and defendant was oral and a broker who received plaintiff's check as a binder on the property was acting solely on behalf of plaintiff. *Hayman v. Ross*, 624.

VENUE**§ 2. Residence of Parties**

The proper venue for an action instituted by domesticated foreign corporation is the county where the corporation's registered office is located, not the county where the corporation has its principal place of business. *Golf, Inc. v. Wrecking Contractors*, 449.

WITNESSES**§ 1. Competency of Witness**

Trial court properly allowed an accomplice to testify although defendant contended the accomplice had been drinking before the crime and had been in mental institutions. *S. v. Cloer*, 57.

§ 5. Evidence Competent for Corroboration

Trial court properly excluded depositions of plaintiff and his father offered for the purpose of corroborating their testimony at the trial. *Miller v. Kennedy*, 163.

§ 6. Evidence Competent to Impeach Witness

Trial court did not err in restricting cross-examination as to prior offenses of plaintiff husband. *Swanson v. Swanson*, 152.

§ 7. Direct Examination

Court's refusal to allow plaintiff to testify as to defects in a house from typewritten notes was not prejudicial. *Griffin v. Wheeler-Leonard & Co.*, 323.

WORD AND PHRASE INDEX

ABANDONMENT

Defense in divorce action after separation legalized, *Harrington v. Harrington*, 419.

Sufficiency of evidence in divorce action, *Lemons v. Lemons*, 303.

ACCESSORY AFTER THE FACT

To involuntary manslaughter, *S. v. Hicks*, 554.

ACCIDENT REPORT

Interrogation to obtain information for, necessity for Miranda warnings, *S. v. Thomas*, 206.

ACCOUNTS

Action by physician, open account, *Hartness v. Penny*, 75.

ADULTERY

Defense to divorce based on one year's separation, *Harrington v. Harrington*, 419.

ADVERSE POSSESSION

Title in boundary dispute case, *Lachmann v. Baumann*, 160.

AFFIDAVIT

Sufficiency to support arrest warrant, *S. v. Orange*, 220.

Unsworn affidavit based on hearsay, motion for summary judgment, *Peace v. Broadcasting Corp.*, 631.

AGGRAVATION OF EXISTING CONDITION

Cause of future pain and suffering, *Howell v. Nichols*, 741.

AGRICULTURE

Power to convey tobacco allotment, *Chavis v. Reynolds*, 734.

AIDING AND ABETTING

Armed robbery case, *S. v. Wright*, 428; *S. v. Moore*, 679.

ALCOHOL INFLUENCE REPORT

Interrogation in patrol car, necessity for Miranda warnings, *S. v. Blakely*, 337.

ALIMONY

See Divorce and Alimony this Index.

ALLOTMENT

Tobacco, power to convey, *Chavis v. Reynolds*, 734.

AMENDMENT

Of complaint to plead last clear chance, *Thacker v. Harris*, 103.

Of gambling warrant, *S. v. Kassouf*, 186.

ANIMALS

Cruelty to dog, *S. v. Fowler*, 144.

ANNEXATION

Hearing required after report amended, *Williams v. Town of Grifton*, 611.

Standing to challenge validity of ordinance, *Taylor v. Raleigh*, 259.

Water system for fire protection adequate, *Williams v. Town of Grifton*, 611.

APPEAL AND ERROR

Appeal from interim order allowing coal cost adjustment charge, *Morgan v. Power Co.*, 497.

APPEAL AND ERROR—Continued

Inability to obtain verbatim transcript, no right to new trial, *Lachmann v. Baumann*, 160; *S. v. Teat*, 484.

Premature appeal from juvenile delinquency hearing, *In re Meyers*, 11.

Record on appeal —

extension of time for docketing to undesignated date, *Clark v. Williams*, 341.

extension of time to serve does not extend time for docketing, *Melton v. Melton*, 694.

ARREST

By officer outside city limits, *S. v. Dark*, 566.

Right to communicate with friends and counsel, *S. v. Dark*, 566.

Without warrant for driving under the influence, *S. v. Dark*, 566; for carrying concealed weapon, *S. v. Faire*, 573.

ARSON

Procuring burning of a store, *S. v. Sargent*, 148.

ASSAULT AND BATTERY

Assault upon police officer, *S. v. Littlejohn*, 305; *S. v. Hammock*, 439.

Firing into occupied dwelling, *S. v. Shumate*, 174.

Instructions, failure to include term "unlawful," *S. v. Harding*, 66.

Shooting of victim five times, *S. v. Dilldine*, 229.

ATTORNEY AND CLIENT

Attorneys' fees provision of note, notice by letter after case heard, *Trust Co. v. Larson*, 371.

Contingent fee agreement, entry during attorney-client relationship, *Rock v. Ballou*, 51.

ATTORNEY AND CLIENT — Continued

Misappropriation of funds by attorney, liability of partnership, *Zimmerman v. Hogg & Allen*, 544.

Revision of note to include provision for attorney fees, *Ragsdale v. Kennedy*, 509.

AUTOMOBILES

Changing lanes, *Hill v. Jones*, 189.

Child alighting from school bus, *Holder v. Moore*, 134.

Defective door, failure to warn passenger, *Holloman v. Holloman*, 176.

Duty of motorist to anticipate negligence, *Holder v. Moore*, 135.

Duty to sound horn, *Houston v. Rivens*, 423.

Failure to stay in proper lane, *Wyatt v. Haywood*, 267.

Involuntary manslaughter, head-on collision while passing another vehicle, *S. v. Plymouth*, 262.

Last clear chance —

amendment of complaint to plead, *Thacker v. Harris*, 103.

sufficiency of evidence, *Earle v. Wyrick*, 24.

Opinion testimony as to speed, *Miller v. Kennedy*, 163; *S. v. Thomas*, 206.

Skidding on ice, *Lewis v. Fowler*, 199.

Stopping on highway, *Lewis v. Fowler*, 199.

Sudden emergency, fall of baby from car seat, *Lawson v. Walker*, 295.

Transfer of vehicle ownership in divorce case, notice, *Howell v. Howell*, 634.

BAILMENT

Car left for repairs, *Norwood v. Works*, 288.

BEST EVIDENCE RULE

Amendment of earlier document, *Craver v. Insurance Co.*, 660.

BICYCLE

Opinion testimony as to speed of in automobile-bicycle collision, *Miller v. Kennedy*, 163.

BILL OF LADING

Conditions binding on shipper, *Leary v. Transit Co.*, 702.

BILL OF PARTICULARS

Waiver of objection to solicitor's failure to furnish, *S. v. Moore*, 640.

BLACKBOARD

Diagram not substantive evidence, *Wyatt v. Haywood*, 267.

BLOOD GROUPING TESTS

Judicial notice of laws of genetics, *S. v. Camp*, 109.

BREACH OF WARRANTY

Action to recover for deficiencies in a house, *Griffin v. Wheeler-Leonard & Co.*, 323.

Fitness of fertilizer, *Potter v. Tyn-dall*, 129.

BREATHALYZER TEST

Admissibility of results, *S. v. Dark*, 566.

BROKERS AND FACTORS

Power of broker in real estate transaction, *Hayman v. Ross*, 624.

BUILDING PERMIT

Discretion of building inspector to withhold, *Quadrant Corp. v. Kingston*, 31.

BURGLARY

Admissibility of items connected with break-in of drugstore, *S. v. Averette*, 181.

BURGLARY—Continued

Breaking in —

business, *S. v. Hackett*, 619.

hardware store, *S. v. Bell*, 348.

home and motor vehicle, *S. v. Marze*, 628.

Possession of implements of house-breaking, *S. v. Beard*, 596.

BUSINESS RECORDS

Admissibility of medical records, *Rhodes v. Hogg & Allen*, 548.

CAPIAS

Assault on officer serving, *S. v. Hammock*, 439.

CARRIERS

Conditions in bill of lading, *Leary v. Transit Co.*, 702.

Loss of household goods, *Leary v. Transit Co.*, 702.

CASE ON APPEAL

Extension of time to serve does not extend time for docketing, *Melton v. Melton*, 694.

Necessity for, *Brantley v. Meekins*, 683.

CHARACTER EVIDENCE

Evidence by State where character not placed in issue, *S. v. Watson*, 540.

CHARTER

Corporation's purchase at foreclosure sale after revocation of, *Parker v. Homes, Inc.*, 297.

CHILD CUSTODY

Award to father, *Newsome v. Newsome*, 651.

Exercise of jurisdiction by N. C. court, *Swanson v. Swanson*, 152.

Lack of specificity of visitation privileges, *Furr v. Furr*, 487.

CHILD CUSTODY—Continued

Standing of foster parent to bring action, *Browne v. Dept. of Social Services*, 476.

CHURCH

Property subject to execution, *Fishel and Taylor v. Church*, 647.

CITY LIMITS

Arrest by city officer outside, *S. v. Dark*, 566.

CLASS RINGS

Receiving stolen goods case, *S. v. Burnette*, 29.

CLERK OF COURT

No authority to amend judgment, *S. v. Thomas*, 206.

Statute of limitations in action for negligence by, *Brantley v. Meekins*, 683.

COAL COST ADJUSTMENT CHARGE

Appeal from interim order, *Morgan v. Power Co.*, 497.

COLLATERAL, IMPAIRMENT OF

Failure to record security agreement, *Trust Co. v. Larson*, 371.

COMMISSION

Construction of employment contract provision, *Houser v. Insurance Co.*, 398.

COMMODITIES

Regulation of London options by State as securities, *Commodities International v. Eure*, 723.

COMPLAINT

Amendment to plead last clear chance, *Thacker v. Harris*, 103.

CONFESSIONS

Belief accomplice had implicated defendants, *S. v. Cannady*, 53.

Hope of lower bond, *S. v. Cannady*, 53.

Miranda warnings, necessity for — defendant's statement when hat handed to him, *S. v. Burton*, 559.

interrogation in emergency room after accident, *S. v. Thomas*, 206; in patrol car while filling out an alcoholic influence report form, *S. v. Blakely*, 337; at police station after drunken driving arrest, *S. v. Pollock*, 214.

Reference to memorandum to refresh recollection, *S. v. Greenlee*, 489.

CONFIDENTIAL INFORMANT

Affidavit for search warrant based on information from, *S. v. Edwards*, 535; *S. v. McAuliffe*, 601.

Refusal to require disclosure of identity, *S. v. Covington*, 250; *S. v. Ketchie*, 637.

Warrantless search of automobile based on information from, *S. v. Ketchie*, 637.

CONSOLIDATION OF CASES

Against husband and wife, *S. v. McAuliffe*, 601.

Discretionary matter, *S. v. Frinks*, 584.

CONSTRUCTIVE POSSESSION

Of marijuana in mobile home, *S. v. Gagne*, 615.

CONTINGENT FEE AGREEMENT

Entry during attorney-client relationship, *Rock v. Ballou*, 51.

CONTINUANCE

Motion based on newspaper articles, *S. v. Logan*, 55.

CONTRACTS

Action on contract made in foreign state, jurisdiction, *Gibbs v. Heavlin*, 482.

Action to recover increased cost of installing electrical conduit, *Electric Co. v. Newspapers*, 519.

Construction of provision for payment of commissions, *Houser v. Insurance Co.*, 398.

Covenant not to compete, *Sales & Service v. Williams*, 410.

Document subject to more detailed agreement, no enforceable agreement, *Boyce v. McMahan*, 254.

Recovery for doors not installed, *Forbes v. Pillmon*, 69.

COORDINATION TESTS

Qualifications of administering officer in drunken driving case, *S. v. Holton*, 27.

CORPORATIONS

Purchase at foreclosure sale after charter revoked, *Parker v. Homes, Inc.*, 297.

Venue of action by domesticated foreign corporation, *Golf, Inc. v. Wrecking Contractors*, 449.

COUNSEL, RIGHT TO

Necessity for Miranda warnings—

applicability to motor vehicle violations, *S. v. Pollock*, 214.

defendant's statement when hat handed to him, *S. v. Burton*, 559.

interrogation in emergency room after accident, *S. v. Thomas*, 206; in patrol car while filling out alcoholic influence report, *S. v. Blakely*, 337; at police station after drunken driving arrest, *S. v. Pollock*, 214.

Photographic identification of defendant, *S. v. Faire*, 573.

COUNSEL, RIGHT TO—Continued

Revocation of suspended sentence in absence of counsel for nonindigent defendant, *S. v. Elliott*, 334.

COVENANT NOT TO COMPETE

Requisites for validity, *Sales & Service v. Williams*, 410.

CRIME AGAINST NATURE

Constitutionality of statute, *S. v. Crouse*, 47.

Instructions on First Book of Moses, *S. v. Crouse*, 47.

Trial after nolle prosequi of rape charge, *S. v. Crouse*, 47.

CROSS EXAMINATION

Past criminal offenses, *S. v. Richardson*, 355.

Past violations of narcotic laws, *S. v. Blackwelder*, 18.

DAMAGES

Aggravation of existing condition, cause of future pain, *Howell v. Nichols*, 741.

Instructions on future damages, *Proctor v. Weyerhaeuser Co.*, 470.

DEEDS

Action to have deed declared deed of trust, *Brown v. Gurkin*, 456.

Reservation of interest, *Hardy v. Edwards*, 276.

DEFAULT JUDGMENT

Entry of default after delivery of suit papers to insurer, *Howell v. Haliburton*, 40.

DEPOSITIONS

Exclusion when offered for corroboration at trial, *Miller v. Kennedy*, 164.

DEVELOPMENT OF LAND

Document subject to more detailed agreement, no enforceable contract, *Boyce v. McMahan*, 254.

DISABILITY INSURANCE

Regular care of physician as requirement, *Duke v. Insurance Co.*, 392.

DISORDERLY CONDUCT

Failure to comply with command to disperse, *S. v. Clark*, 81; *S. v. Orange*, 220.

DIVORCE AND ALIMONY

Abandonment—

defense of after separation legalized by custody and support order, *Harrington v. Harrington*, 419.

sufficiency of evidence, *Lemons v. Lemons*, 303.

Adultery as defense to divorce action based on year's separation, *Harrington v. Harrington*, 419.

Alimony pendente lite—

failure to make findings as to wife's resources and needs, *Simmons v. Simmons*, 68; *Newsome v. Newsome*, 651.

Demand for jury trial, *Laws v. Laws*, 344.

Estoppel to assert invalidity of property settlement decree, *Broughton v. Broughton*, 233.

Notice of hearing to reduce past due alimony to judgment, *Howell v. Howell*, 634.

Permitting wife to use acreage surrounding residence, *Furr v. Furr*, 487.

Setting aside absolute divorce for mistake, surprise and excusable neglect, *Mason v. Mason*, 494.

Visitation privileges, lack of specificity in order, *Furr v. Furr*, 487.

Wife not dependent spouse, *Lemons v. Lemons*, 303.

DOG

Cruelty to, *S. v. Fowler*, 144.

DOOR

Defective in automobile, failure to warn passenger, *Holloman v. Holloman*, 176.

DOUBLE JEOPARDY

Possession and sale of same heroin, *S. v. Brinkley*, 339.

Trial for sodomy after nolle prosequi of rape charge, *S. v. Crouse*, 47.

DRUGSTORE

Breaking and larceny, *S. v. Averette*, 181.

DRUNKEN DRIVING

Coordination tests, qualifications of administering officer, *S. v. Holton*, 27.

Failure of witness to state defendant's faculties "appreciably" impaired, *S. v. Livingston*, 346.

DWELLING

Unfit for human habitation, demolition without compensation, *Harell v. Winston-Salem*, 386.

ELECTRICAL CONDUIT

Action to recover increased cost of installing, *Electric Co. v. Newspapers*, 519.

ELECTRICITY

Operation of power company by city, *Power Co. v. High Point*, 91.

ELECTRIC POWER RATES

Appeal from interim order allowing fuel cost adjustment charge, *Morgan v. Power Co.*, 300; *Morgan v. Power Co.*, 497.

ENTRAPMENT

Instructions in narcotics case, *S. v. Armstrong*, 36.

ESCAPE

Second escape under different sentence, *S. v. Stone*, 352.

ESTOPPEL

Execution of warranty deed, estoppel to claim easement, *Sparks v. Choate*, 62.

EXECUTION

Church property subject to, *Fishel and Taylor v. Church*, 647.

EXECUTORS AND ADMINISTRATORS

Qualification of foreign administratrix, *Johnson v. Trust Co.*, 8.

EXPRESSION OF OPINION

Comment on guilt in instructions, *S. v. Whitley*, 666.

Remarks of trial judge in chambers, *S. v. Dark*, 566.

Whispering between judge and witness, *S. v. McAuliffe*, 601.

FAILURE TO DISPERSE

Failure to leave county courthouse steps, *S. v. Orange*, 220; school superintendent's office, *S. v. Clark*, 81.

FAILURE TO TESTIFY

Necessity for instructions on, *S. v. Letterlough*, 681.

FALSE IMPRISONMENT

Stopping customer to examine sweater, *Shaw v. Stores, Inc.*, 140.

FARM EQUIPMENT

No tenancy in common, *Long v. Edleman*, 43.

FELONIOUS BURNING

Burning of store at Pembroke State University, *S. v. Sargent*, 148.

FELONY-MURDER

No merger of charges, *S. v. Glenn*, 6.

FERTILIZER

Inapplicability of statute to action for breach of warranty, *Potter v. Tyndall*, 129.

FIDUCIARIES

No duty of corporate president to directors, *Ragsdale v. Kennedy*, 509.

FIRE

Inapplicability of *res ipsa loquitur*, *Gaston v. Smith*, 242.

FIRE INSURANCE

Sufficiency of evidence of loss by fire, *Insurance Co. v. Tire Co.*, 237.

FIRST BOOK OF MOSES

Instructions on in crime against nature case, *S. v. Crouse*, 47.

FORECLOSURE SALE

Corporation's purchase at after charter revoked, *Parker v. Homes, Inc.*, 297.

FORMER JEOPARDY

See Double Jeopardy this Index.

FOSTER PARENT

Standing to bring custody case, *Browne v. Dept. of Social Services*, 476.

FRAUD

Stock sale by president to directors, *Ragsdale v. Kennedy*, 509.

GAMBLING WARRANT

Quantum of proof for conviction, *S. v. Kassouf*, 186.

GOLD MINE

Statement in sale of corporate stock, *Ragsdale v. Kennedy*, 509.

GROCERY STORE

Fall by customer in, *Tolbert v. Tea Co.*, 491.

GUARANTEED ANNUAL INCOME PLAN

Effect on unemployment compensation for longshoremen, *In re Beatty*, 563.

HARDWARE STORE

Sufficiency of evidence of breaking, *S. v. Bell*, 348.

HEARSAY

Affidavit based on, motion for summary judgment, *Peace v. Broadcasting Corp.*, 631.

HEROIN

Possession with intent to distribute, *S. v. Aikens*, 310; *S. v. Brinkley*, 339.

HIGHWAY

Sufficiency of evidence of obstructing, *S. v. Frinks*, 584.

HOMICIDE

Accessory after the fact to involuntary manslaughter, *S. v. Hicks*, 554.

Death from gunshot wound, *S. v. Walker*, 22; *S. v. Brake*, 342.

Death from stabbing, *S. v. Curtis*, 606.

Felony-murder, no merger of charges, *S. v. Glenn*, 6.

Instructions on reducing crime to manslaughter, *S. v. Carver*, 674.

Self-defense, adequacy of instructions, *S. v. Canty*, 45.

HOSPITAL

County agency and not municipal corporation, *Sides v. Hospital*, 117.

HOSPITAL EMERGENCY ROOM

Identification of defendant in, *S. v. Johnson*, 183.

Interrogation for accident report, necessity for Miranda warnings, *S. v. Thomas*, 206.

HOSTILE WITNESS

Allowing State to examine own witness, *S. v. Leonard*, 63.

HOUSEHOLD GOODS

Loss by trucking company, *Leary v. Transit Co.*, 702.

HOUSING CODE

Dwelling unfit for human habitation, *Harrell v. Winston-Salem*, 386.

ICE

Automobile accident after skidding, *Lewis v. Fowler*, 199.

IDENTIFICATION OF DEFENDANT

Accidental confrontation at police station, *S. v. Faire*, 573.

**IDENTIFICATION OF
DEFENDANT—Continued**

- Identification in hospital emergency room, *S. v. Johnson*, 183.
- Independence of in-court identification, *S. v. White*, 123; *S. v. Johnson*, 183; *S. v. Faire*, 573.
- Photographic identification of defendant, *S. v. Faire*, 573.
- Pretrial identification at automobile, *S. v. White*, 123.
- Pretrial showup, *S. v. White*, 123.
- Uncertainty of testimony in robbery case, *S. v. Willis*, 465.
- Voir dire findings—
failure to make, *S. v. Russell*, 156.
sufficiency of, *S. v. Collins*, 590.

IMPAIRMENT OF COLLATERAL

- Failure to record security agreement, *Trust Co. v. Larson*, 371.

INCONSISTENT STATEMENT

- Exclusion prejudicial, *S. v. Hackett*, 619.

INCRIMINATING STATEMENT

- See Confessions this Index.

INDIANS

- Burning of store by, *S. v. Sargent*, 148.

INDICTMENT AND WARRANT

- Amendment of gambling warrant proper, *S. v. Kassouf*, 186.
- Incorrect middle name of defendant, *S. v. Faire*, 573.
- Sufficiency of affidavit to support warrant, *S. v. Orange*, 220; *S. v. Reavis*, 499.

INDIGENT

- Denial of transcript of prior trial, *S. v. Peek*, 350.

INFANTS

- Fall of baby from car seat, sudden emergency, *Lawson v. Walker*, 295.
- Jurisdiction of Georgia court over children in N. C., *Swanson v. Swanson*, 152.
- Standing of former foster parent to bring custody action, *Browne v. Dept. of Social Services*, 476.
- Trial of 14-year-old for felony, *In re Bullard*, 245.

INFORMANT

- See Confidential Informant this Index.

INJUNCTIONS

- Restraining enforcement of statute, *Commodities International v. Eure*, 723.

INSURANCE

- Automobile liability policy—
release of insurer bar to action against insured, *Carder v. Henson*, 318.
subrogation of insurer for medical payments, *Carver v. Mills*, 745.
- Disability, regular care of physician required, *Duke v. Insurance Co.*, 392.
- Fire insurance, proof of loss of inventory, *Insurance Co. v. Tire Co.*, 237.
- Fraudulent claim, real injury, *S. v. Walker*, 291.
- General agent's contract, construction of, *Houser v. Insurance Co.*, 398.
- Life insurance, murder of beneficiary and suicide of insured, *Gardner v. Insurance Co.*, 404.

INTERSTATE COMMERCE

- Burden on by statute requiring Utilities Commission's approval of

**INTERSTATE COMMERCE —
Continued**

- issuance of securities, *Utilities Comm. v. Telegraph Co.*, 714.
Soft drink tax as burden on, *Food Stores v. Jones*, 272.

INTOXICATION

- Effect on lesser degrees of homicide, *S. v. Cummings*, 452.
Opinion testimony, inadequate opportunity to observe, *S. v. Cummings*, 452.

INVITED ERROR

- Instructions agreed to by counsel, *Craver v. Insurance Co.*, 660.

INVITEE

- Fall on grocery store floor, *Tolbert v. Tea Co.*, 491.
Fall on polished floor, *Burkhead v. White*, 432.

**INVOLUNTARY
MANSLAUGHTER**

- Head-on collision while passing another vehicle, *S. v. Plymouth*, 262.

JUDGMENTS

- Amendment by clerk of court, *S. v. Thomas*, 206.
Entry of default, setting aside where suit papers delivered to insurer, *Howell v. Haliburton*, 40.
Setting aside absolute divorce for mistake, surprise and excusable neglect, *Mason v. Mason*, 494.

JURISDICTION

- Action on contract made in foreign state, realty in this State and in other state, *Gibbs v. Heavlin*, 482.

JURY

- Trial by, demand for in absolute divorce action, *Laws v. Laws*, 344.

JURY ARGUMENT

- Comparing defendant to a snake, *S. v. Gagne*, 615.
Concerning child using drugs, *S. v. Sanderson*, 669.

JUVENILE DELINQUENT

- Premature appeal from continuance of disposition, *In re Meyers*, 11.

**LABORERS' AND
MATERIALMEN'S LIENS**

- Failure to show agency of contractor for owner, *Maxwell v. Perry*, 58.
Time of filing, *Strickland v. Contractors*, 729.

LACHES

- Attack on rezoning ordinance, *Taylor v. Raleigh*, 259.

LANDLORD AND TENANT

- Acceptance of late rent payment, *Mewborn v. Haddock*, 285.

LARCENY

- Articles not removed from premises broken into, *S. v. Vickers*, 282.
Instructions on value of property taken, *S. v. Wright*, 428.
Of tractor, sufficiency of evidence, *S. v. Boykins*, 34.

LAST CLEAR CHANCE

- Amendment of complaint to plead, *Thacker v. Harris*, 103.
Sufficiency of evidence, *Earle v. Wyrick*, 24; *Thacker v. Harris*, 103.

LEADING QUESTIONS

- Allowance proper, *S. v. Thompson*, 178; *S. v. Collins*, 590.

LIFE INSURANCE

Murder of beneficiary and suicide of insured, *Gardner v. Insurance Co.*, 404.

LIMITATION OF ACTIONS

Negligence by clerk of court, *Brantley v. Meekins*, 683.

Wrongful death action barred, *Johnson v. Trust Co.*, 8.

LIS PENDENS

Inapplicable in action for payment of money, *Lord v. Jeffreys*, 13.

LOGS

Negligence while unloading, *Proctor v. Weyerhaeuser Co.*, 470.

LONDON OPTIONS

Regulation by State as securities, *Commodities International v. Eure*, 723.

LONGSHOREMEN

Unemployment compensation, unavailability for work, *In re Beaty*, 563.

MALICIOUS PROSECUTION

Conviction in district court as showing probable cause, *Falkner v. Almon*, 643.

Sufficiency of evidence for jury, *Falkner v. Almon*, 643.

MANSLAUGHTER

Accessory after the fact, *S. v. Hicks*, 554.

MARIJUANA

Chain of custody of exhibits, *S. v. Stalls*, 265.

Omission of word "possession" in verdict, *S. v. May*, 71.

MARIJUANA—Continued

Presumption of possession for sale, *S. v. McAuliffe*, 601.

Sufficiency of evidence of constructive possession, *S. v. Gagne*, 615.

Sufficiency of evidence of distribution, *S. v. Armstrong*, 36; *S. v. Williams*, 502.

MEDICAL PAYMENTS

Subrogation of liability insurer for, *Carver v. Mills*, 745.

MEDICAL RECORDS

Admissibility as business records, *Rhodes v. Hogg & Allen*, 548.

MENTAL CAPACITY

Failure to submit question to jury, *S. v. Tillman*, 688.

MIRANDA WARNINGS

Applicability to motor vehicle violations, *S. v. Pollock*, 214.

Necessity for—

defendant's statement when hat handed to him, *S. v. Burton*, 559.

interrogation in emergency room after accident, *S. v. Thomas*, 206; in patrol car while filling out alcoholic influence report, *S. v. Blakely*, 337; at police station after drunken driving arrest, *S. v. Pollock*, 214.

MISTRIAL

Denial after improper question by solicitor, *S. v. Harris*, 332; after improper conduct of prosecuting witness and father, *S. v. Dais*, 379.

Motion for, jury hearing verdict in previous case, *S. v. Willis*, 465.

MOOTNESS

Repeal of statutory basis for case, *Town of Wadesboro v. Holshouser*, 65.

MOTION TO QUASH INDICTMENT

Incorrect middle name of defendant,
S. v. Faire, 573.

MUFFLERS

Evidence of on assailant's car, *S. v. Curtis*, 606.

MUNICIPAL CORPORATIONS

Amendment of annexation report,
Williams v. Town of Grifton, 611.

Building permit, discretion of building inspector to withhold, *Quadrant Corp. v. Kinston*, 31.

Hospital not municipal corporation,
Sides v. Hospital, 117.

Operation of power company by city, *Power Co. v. High Point*, 91.

Rezoning ordinance, standing to challenge, *Taylor v. City of Raleigh*, 259.

NARCOTICS

Cross-examination as to past violations, *S. v. Blackwelder*, 18.

Evidence of defendant's bad character, *S. v. Watson*, 540.

Incomplete verdict in marijuana case, *S. v. May*, 71.

Possession and sale of same heroin not double jeopardy, *S. v. Brinkley*, 339.

Possession of phencyclidine hydrochloride, first offense a misdemeanor, *S. v. Gagne*, 615.

Possession with intent to distribute—

heroin, *S. v. Aikens*, 310; *S. v. Brinkley*, 339.

marijuana, *S. v. Armstrong*, 36; *S. v. Williams*, 502.

Presumption of possession of marijuana for sale, *S. v. McAuliffe*, 601.

Prior drug transactions with defendant, *S. v. Logan*, 55.

Warrantless seizure of amphetamines, *S. v. Crews*, 171.

NEGLIGENCE

Fall by customer in grocery store,
Tolbert v. Tea Co., 491.

Fall by invitee on polished floor,
Burkhead v. White, 432.

Injury while unloading logs, *Proctor v. Weyerhaeuser Co.*, 470.

NEWLY DISCOVERED EVIDENCE

Motion for new trial, *S. v. Lee*, 4.

NONRESIDENT DRIVER

Alternate methods of service of process on, *House v. House*, 686.

NOTES

Testimony of witness from, *S. v. Collins*, 590.

NOTICE

Hearing on motion to reduce past due alimony to judgment, *Howell v. Howell*, 634.

Transfer of vehicle ownership in divorce case, *Howell v. Howell*, 634.

OBSCENITY

Applicability of favorable change in statute, *S. v. Hart*, 738.

OBSTRUCTING HIGHWAY

Sufficiency of evidence of, *S. v. Frinks*, 584.

OPEN MEETINGS LAW

Private meetings by school board in selection of school site, *Eggiman v. Board of Education*, 459.

OPTIONS

Regulation as securities, *Commodities International v. Eure*, 723.

OVERREACHING

Contract to sell land, *Hutchins v. Honeycutt*, 527.

OWL, FIRING AT

Defense in assault case, *S. v. Shumate*, 174.

PARENTAL RIGHTS

Hearing to terminate, failure to hear all the evidence, *Dept. of Social Services v. Roberts*, 658.

Termination for physical abuse of child, *In re Hennie*, 690.

PARTNERSHIP

Liability for law partner's misappropriation of funds, *Zimmerman v. Hogg & Allen*, 544.

PASSIVE TRUST

Church property subject to execution, *Fishel and Taylor v. Church*, 647.

PATERNITY

Blood grouping tests, judicial notice of laws of genetics, *S. v. Camp*, 109.

PEDESTRIAN

Contributory negligence—
in crossing street at other than crosswalk, *Brooks v. Boucher*, 676.
in walking in left lane, *Earle v. Wyrick*, 24.

PEMBROKE STATE UNIVERSITY

Burning of store by Indians, *S. v. Sargent*, 148.

PERSONAL PROPERTY

No tenancy in common in farm equipment, *Long v. Eddleman*, 43.

PHOTOSTATIC COPY

Proof of contents of lost warrant, *S. v. Edwards*, 535.

PHYSICAL PERFORMANCE TESTS

Qualifications of administering officer in drunken driving case, *S. v. Holton*, 27.

PLAIN VIEW

Warrantless seizure of amphetamines, *S. v. Crews*, 171; items from car, *S. v. Russell*, 156.

PLEA

Change by codefendant, *S. v. Beard*, 596.

POWER COMPANY

Operation of by city, *Power Co. v. High Point*, 91.

PRAYER FOR JUDGMENT CONTINUED

No right to appeal from, *S. v. Cook*, 353.

PRELIMINARY HEARING

For infant charged with felony, *In re Bullard*, 245.

PRIOR CONVICTIONS

Failure to determine whether defendant represented by counsel, *S. v. Crouse*, 47.

Instruction on consideration as substantive evidence, *S. v. Cogdell*, 327.

Specific criminal act for which indicted, *S. v. Logan*, 55.

PRIVATE PROSECUTOR

Absence of prejudice in remarks of, *S. v. Page*, 435.

Discretion of court in permitting private prosecutor to assist solicitor, *S. v. Page*, 435.

PROBATION

Failure to bring defendant before court when file reviewed, *S. v. Benfield*, 330.

Revocation for removing residence without permission, *S. v. Benfield*, 330.

Revocation in absence of defense counsel for nonindigent defendant, *S. v. Elliott*, 334.

Wilful failure to pay fine, *S. v. Harris*, 279.

PROBATION COMMISSION

Suit to enjoin closing of district office, *Town of Wadesboro v. Holsouser*, 65.

PROCESS

Alternate methods of service on non-resident driver, *House v. House*, 686.

PROPERTY SETTLEMENT DECREE

Estoppel to assert invalidity, *Broughton v. Broughton*, 233.

PUNISHMENT

See Sentence this Index.

QUANTUM MERUIT

Recovery for doors not installed, *Forbes v. Pillmon*, 69.

RAILROADS

Contributory negligence by motorist in crossing accident, *Neal v. Booth*, 415.

RAPE

Instructions in prosecution for assault with intent to commit, *S. v. Dais*, 379.

REASONABLE DOUBT

Error in instructions cured by mandate, *S. v. Shumate*, 174.

RECEIVING STOLEN GOODS

Absence of evidence someone else stole property, *S. v. Burnette*, 29.

RECORD ON APPEAL

Extension of time for docketing to undesignated date, *Clark v. Williams*, 341.

Extension of time to serve does not extend time for docketing, *Melton v. Melton*, 694.

RELEASE

Bar to subsequent action against insured, *Carder v. Henson*, 318.

RENT

Acceptance of late payment, *Mewborn v. Haddock*, 285.

REPAIRS

Negligence of bailee of automobile, *Norwood v. Works*, 288.

RES IPSA LOQUITUR

Action to recover damages from fire, *Gaston v. Smith*, 242.

ROBBERY

Aiding and abetting, *S. v. Wright*, 428; *S. v. Moore*, 679.

Of service station attendant, *S. v. Russell*, 156.

RUG

Fall by invitee on rug on polished floor, *Burkhead v. White*, 432.

RULES OF CIVIL PROCEDURE

Affidavit based on hearsay, motion for summary judgment, *Peace v. Broadcasting Corp.*, 631.

Appeal from denial of summary judgment, *Sides v. Hospital*, 117.

Summary judgment based on prior trial testimony where new trial granted, *Hodges v. Johnson*, 308.

SCHOOL BUS

Child alighting from on four-lane highway, *Holder v. Moore*, 134.

SCHOOL SITE

Selection after private meetings of school board, *Eggimann v. Board of Education*, 459.

SCHOOL SUPERINTENDENT

Failure to disperse from office of, *S. v. Clark*, 81.

SEALS

Importation of valuable consideration, *Ragsdale v. Kennedy*, 509.

SEARCHES AND SEIZURES

Consent to search vehicle, *S. v. Beard*, 596.

Consent to warrantless search as condition of suspended sentence, *S. v. Mitchell*, 663.

Demand and denial of entry for search required, *S. v. Gagne*, 615.

Failure to make findings on voir dire, *S. v. Beard*, 596.

Search warrant—

affidavit based on information from confidential informant, *S. v. Covington*, 250; *S. v. Edwards*, 535.

proof of contents of lost warrant by photostatic copy, *S. v. Edwards*, 535.

Sufficiency of affidavit, *S. v. Reavis*, 499.

Warrantless seizure of—

amphetamines, *S. v. Crews*, 171.
articles in plain view, *S. v. Russell*, 156.

SECURITIES

Determination of whether London options are, *Commodities International v. Eure*, 723.

Issuance by utility, statute requiring Utilities Commission's approval,

SECURITIES—Continued

Utilities Comm. v. Telegraph Co., 714.

SECURITY AGREEMENT

Failure to record, no impairment of collateral, *Trust Co. v. Larson*, 371.

SELF-DEFENSE

Adequacy of instructions, *S. v. Canty*, 45.

SENTENCE

More severe sentence upon retrial, *S. v. Thomas*, 206; *S. v. Butts*, 504.

Necessity for explanation of severity of, *S. v. Frinks*, 584.

Prejudice cured by concurrent sentences, *S. v. Byrd*, 320.

SERVICE STATION

Robbery of attendant, *S. v. Russell*, 156.

SHIPPERS

Conditions in bill of lading binding on, *Leary v. Transit Co.*, 702.

SHIPPING CHARGES

Action to recover for shipment of stone, *Freight Carriers v. Allen Co.*, 442.

SLANDER

Stopping customer to examine sweater, *Shaw v. Stores, Inc.*, 140.

SODOMY

Trial for after nolle prosequi of rape charge, *S. v. Crouse*, 47.

SOFT DRINK TAX

Discrimination against nonresident distributors, *Food Stores v. Jones*, 272.

SOUTHERN BELL

Statute requiring Utilities Commission's approval of issuance of securities by, *Utilities Comm. v. Telegraph Co.*, 714.

SPECIAL USE PERMIT

Absence of findings of fact in denial of, *Long v. Board of Adjustment*, 191.

SPECIFIC PERFORMANCE

Oral real estate contract, *Hayman v. Ross*, 624.

Overreaching by buyer, *Hutchins v. Honeycutt*, 527.

SPEEDY TRIAL

Lapse of 14 months between offense and trial, *S. v. Roberts*, 579.

No showing of prejudice from delay, *S. v. Kassouf*, 186.

STABBING

Sufficiency of proof of death by, *S. v. Curtis*, 606.

STATUTE OF LIMITATIONS

Negligence by clerk of court, *Brantley v. Meekins*, 683.

Wrongful death action barred, *Johnson v. Trust Co.*, 8.

STATUTES

Applicability of favorable change in obscenity statute to defendant, *S. v. Hart*, 738.

STOCK

Attorney's misappropriation of funds given to buy, *Zimmerman v. Hogg & Allen*, 544.

Sale by president to directors, *Ragsdale v. Kennedy*, 509.

STRAWBERRIES

Fall by customer in grocery store caused by, *Tolbert v. Tea Co.*, 491.

SUBROGATION

Medical payments by liability insurer, *Carver v. Mills*, 745.

Security interest in chattels destroyed by fire, *Insurance Co. v. Tire Co.*, 237.

SUDDEN EMERGENCY

Fall of baby from car seat, *Lawson v. Walker*, 295.

SUICIDE

Life insurance proceeds after murder of beneficiary and suicide of insured, *Gardner v. Insurance Co.*, 404.

SUMMARY JUDGMENT

Appeal from denial, *Sides v. Hospital*, 117.

Based on prior trial testimony where new trial granted, *Hodges v. Johnson*, 308.

Unsworn affidavit based on hearsay, *Peace v. Broadcasting Corp.*, 631.

SUSPENDED SENTENCE

Consent to warrantless search as condition of, *S. v. Mitchell*, 663.

Revocation in absence of defense counsel for nonindigent defendant, *S. v. Elliott*, 334.

SWEATER

Stopping customer to examine, action for false arrest and slander, *Shaw v. Stores, Inc.*, 140.

TAXATION

Goods stored in public warehouse, *In re Martin*, 225.

TAXATION—Continued

Soft drink tax as burden on interstate commerce, *Food Stores v. Jones*, 272.

TENANTS IN COMMON

Funds advanced by wife for farm equipment, *Long v. Eddleman*, 43.

TOBACCO

Power to convey allotment, *Chavis v. Reynolds*, 734.

TRACTOR

Larceny of, *S. v. Boykins*, 34.

TRANSCRIPT

Belated motion for transcript of district court trial, *S. v. Clark*, 81.

Denial of indigent's request for transcript of prior trial, *S. v. Peek*, 350.

Inability to obtain for appeal, *Lachmann v. Baumann*, 160; *S. v. Teat*, 484.

TRUCKING COMPANY

Loss of household goods, *Leary v. Transit Co.*, 702.

"TRYING"

Use of word as opinion testimony, *S. v. Orange*, 220.

**UNEMPLOYMENT
COMPENSATION**

Unavailable for work as longshoremen, *In re Beatty*, 563.

UNFIT DWELLINGS

Demolition by city, *Harrell v. Winston-Salem*, 386.

UNIFORM COMMERCIAL CODE

Failure to record security agreement, no impairment of collateral, *Trust Co. v. Larson*, 371.

Nonconforming delivery, *Meads v. Davis*, 479.

UTILITIES COMMISSION

Interim rate increase, *Morgan v. Power Co.*, 300; *Morgan v. Power Co.*, 497.

Jurisdiction over power company in city, *Power Co. v. High Point*, 91.

Statute requiring approval of for issuance of securities, *Utilities Comm. v. Telegraph Co.*, 714.

VENUE

Action by domesticated foreign corporation, *Golf, Inc. v. Wrecking Contractors*, 449.

Change of, motion based on newspaper articles, *S. v. Logan*, 55.

VERDICT

Correction by jury by substituting sum of expenses, *Brown v. Moore*, 445.

Incomplete verdict in marijuana case, *S. v. May*, 71.

Waiver of right to be present when rendered, *S. v. Billings*, 73.

VISITATION PRIVILEGES

Lack of specificity in order, *Furr v. Furr*, 487.

VOIR DIRE

Failure to hold to determine admissibility of defendant's statements, *S. v. Harrington*, 473; *S. v. Hackett*, 619.

Failure to make findings, *S. v. Russell*, 156; *S. v. Beard*, 596.

WARRANTY, BREACH OF

Action to recover for deficiencies in a house, *Griffin v. Wheeler-Leonard & Co.*, 323.

Fitness of fertilizer, *Potter v. Tyn-dall*, 129.

WARRANTY DEED

Estoppel of person signing to claim easement, *Sparks v. Choate*, 62.

WITNESSES

Hostile witness, allowing State to examine own witness, *S. v. Leonard*, 63.

WRONGFUL DEATH

Failure to qualify as administratrix in apt time, *Johnson v. Trust Co.*, 8.

Sufficiency of evidence, *Wyatt v. Haywood*, 267.

ZONING

Denial of special use permit, absence of findings, *Long v. Board of Adjustment*, 191.

Laches in attack on rezoning ordinance, *Taylor v. City of Raleigh*, 259.

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